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Supreme Court, U.S.
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No. 10-1088

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In the Supreme Court of the United States

DEBORAH HINTON-LYNCH,

Petitioner,

v.

CHESARE HORTON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Georgia

PETITION FOR A WRIT OF CERTIORARI

DEBORAH HINTON-LYNCH
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Pro Se Petitioner

QUESTIONS PRESENTED

An initial custody decree granting Petitioner sole custody of the minor child is rendered in the state of Georgia. Respondent sought modification of Georgia's custody decree in the sister state of New Jersey which was granted. On appeal, petitioner challenged New Jersey's lower court's authority to grant petition under the U.C.C.J.E.A. § 203 (1997). The New Jersey Court of Appeals vacated the judgment granting respondent custody due to lack of subject matter jurisdiction. Petitioner domesticated the New Jersey Appellate judgment in Georgia for purposes of Full Faith and Credit and for the immediate release of the minor child into her control. The question presented is:

1. Whether at the time of domestication of the New Jersey foreign judgment, Georgia's refusal to immediately release the minor child upon demand of Petitioner—whose status reverted to that of sole custodian per the last existing custody decree—contravened the Full Faith and Credit Clause of the United States Constitution. *Durfee v. Duke*, 375 U.S. 106 (1963).

2. Whether the Georgia Court of Appeals acted *ultra vires* by affirming on the merits of Respondent's petition in violation of both *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), and Art. VI, cl. 2 of the United States Constitution, when it precluded review of Petitioner's challenge asserting lack of jurisdiction of Georgia's lower court under OCGA § 9-11-60(d).

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the court below are named in the caption of the case in this Court. At both the New Jersey and Georgia trial court levels, Deborah Hinton-Lynch was the defendant and Chesare Horton was the plaintiff.

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OPINION BELOW

The opinion of the Georgia Appeals Court is unreported. (A09A1934) (Pet App. 1a-9a)

BASIS FOR JURISDICTION IN THIS COURT

The Georgia Court of Appeals affirmed the trial court's ruling on March 3, 2010. Pet. App. 1a-9a. Petitioner's Motion to Extend Time to File Petition for Certiorari to Georgia Supreme Court was granted on March 15, 2010. Pet. App. 103a. Said court denied Petitioner's Writ of Certiorari on September 7, 2010. Pet. App. 18a. Petitioner's Motion for Rehearing filed on September 16, 2010, was denied on October 4, 2010. Pet. App. 19a.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 to review by writ of certiorari the final rulings of the highest state court of Georgia which involve a federal constitutional law question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Constitution

Article IV, Section I of the United States Constitution

Full Faith and Credit shall be given in each state to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Federal Statute

28 U.S.C. § 687; 28 U.S.C.A. § 1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

Article VI, Clause 2.
of the United States Constitution

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.C.C.J.E.A. Art. 1, § 101 et seq, which is set out in the Appendix to this Petition. Pet. App. 104-108a.

STATEMENT OF THE CASE

Deborah Hinton-Lynch, (hereafter "Petitioner" and Chesare Horton (hereafter "Respondent") were never married. Their only child together, Tiffany Summer-Raye Horton, (hereafter "Summer-Raye") was born on June 6, 2000 in Belleville, New Jersey. Respondent moved to Georgia in November 1999; Petitioner and minor child subsequently relocated to Georgia in November of 2000. Petitioner filed for child support in December of 2001. Child support and custody was incorporated into a consent order on March 27, 2002, in the Superior Court of Cobb County, Georgia decreeing Petitioner sole custodian. Pet. App. 32a, Para 9. Respondent petitioned for legitimization and visitation. Legitimization and *supervised* visitation was granted on April 25, 2002. (T-33, L 1-6)

Petitioner subsequently relocated back to New Jersey in May of 2002. Petitioner petitioned for reinstatement on the issue of supervised visitation against Respondent in the Essex County Superior Court of New Jersey in October of 2004. A visitation hearing was held on January 4, 2005 before Judge Patricia M. Talbert. Petitioner missed the hearing based on the incorrect assumption that the hearing was scheduled for the following day, on January 5, 2005. The trial court sua sponte, reissued another summons to appear on the issue of visitation and scheduled the hearing for January 31, 2005. Petitioner appeared and alerted the trial court that Respondent had removed Summer-Raye without Petitioner's knowledge or consent, the previous night from the maternal grandmothers' home in North Carolina and took her into the state of Georgia. Pet. App. 50-51a. The New Jersey trial court concluded, without an evidentiary hearing or any witnesses, that Petitioner had permanently relinquished custody of minor child to maternal grandparents thereby authorizing a finding that Respondent's taking of the Respondent Child from North Carolina was justified due to "abandonment." Pet. App. 3a.

Respondent filed his *first* application to modify the original Georgia child custody order in the state of New Jersey. Pet. App. 25a.[1] On March 17, 2005, the New Jersey Superior court granted Respondent residential and legal custody. Pet. App. 12a.

In 2006, Petitioner unsuccessfully petitioned several times in Georgia to have the New Jersey order vacated citing among other reasons, lack of jurisdiction of the New Jersey courts under the Uniform Child Custody Jurisdiction and Enforcement Act. ("UCCJEA"). Pet. App. 13-14a. On June 22, 2007, Petitioner petitioned the New Jersey Superior Court to vacate its order granting Respondent custody arguing a lack of subject matter jurisdiction under the UCCJEA. The New Jersey trial court denied the petition and Petitioner appealed pro-se to the New Jersey Appellate Court. On September 23, 2008, the New Jersey Appellate division vacated the lower court's order upon a finding of lack of subject matter jurisdiction and dismissed Respondent's application for modification of custody. Pet. App. 23-29a.

On September 24, 2008, Petitioner filed for Domestication of Foreign Judgment in Cobb County Superior Court of Georgia. Pet. App. 20-22a. Upon notice of the New Jersey Appellate decision, Respondent, counterclaimed for temporary emergency custody and permanent modification of child custody *on the exact same day* Petitioner filed her domestication of the New Jersey decree. (R. 19-21).[2] A hearing was held *24 hours later* on September 25, 2008, on the matter of Respondent's temporary emergency custody petition. But Petitioner's domestication petition addressing the New Jersey judgment was not allowed audience. The fantastical grounds Respondent cited to support a showing of a change in circumstance, which is a prerequisite for a petition for modification to be brought, was based on the belief that Petitioner

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[1] Respondent's domiciliary has been Georgia throughout all custody and visitation proceedings relating to the minor child.
[2] "R" cites to the record and number of evidence filed in the Cobb County Superior Court at the December 11, 2008 hearing.

would "abscond" with the minor child. (R-12) Judge Michael Stoddard granted Respondent's temporary emergency custody petition on the grounds that the status quo should be maintained until a final hearing on the matter. (R-22)

A final hearing was held on December 11, 2008. (R-52)

On December 19, 2008, Respondent's petition for modification of child custody and child support was granted. Pet. App. 10 17a.[3] Petitioner timely filed a notice of appeal on December 31, 2008. (R-3) The federal claim that the domesticated New Jersey Foreign Judgment was to be afforded Full Faith and Credit under the United States Constitution was first presented to the Georgia Court of Appeals by way of (Reply Brief of Appellant). Pet. App. 61a.

On March 3, 2010, the Georgia Appeals Court affirmed the judgment of the Superior Court of Cobb County, Georgia. Pet. App. 9a. The Court expressed in its opinion that Petitioner's first Enumeration of Error was precluded from review because it believed that the doctrine of res judicata was being raised for the first time on appeal.[4] On April 13, 2010, Petitioner appealed the judgment of the Georgia Appeals Court by Writ of Certiorari to the Supreme Court of Georgia. Pet. App. 65-80a. Petitioner preserved and argued the issue that Georgia's lower court lacked authority to entertain Respondent's petition for modification of custody, among other issues, and that the Georgia Court of Appeals lacked jurisdiction to reach the merits to affirm the lower court. Pet. App. 77a, 100-101a. The Supreme Court of Georgia denied said Writ on September 7, 2010. Pet. App. 18a. Petitioner sought rehearing by the Supreme Court of Georgia. Petitioner once again presented the federal claim that the domesticated New Jersey Foreign Judgment was to be afforded Full Faith and Credit under the United States

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3 *Note*: Portions of the order not deemed necessary were omitted.

4 Petitioner squarely placed the issue as to whether the trial court's order was void due to lack of jurisdiction under O.C.G.A. 9-11-60(d). *See* Pet. App. 54-56a.

Constitution. Pet. App. 95-97a. Rehearing was denied on the October 4, 2010. Pet. App. 19a.

SUMMARY OF ARGUMENT

1. The decision of the Georgia Court of Appeals undermines the central tenets under Art. IV, §1 of the United States Constitution that foreign judgments are to be afforded full faith and credit upon proper domestication in the state of Georgia.

2. The decision of the Georgia Court of Appeals directly contravenes the Supremacy Clause of the United States Constitution by failing to carry out its mandatory duty to ascertain whether federal and statutory provisions have conferred authority on it to act before reaching the merits of this case. The Georgia Court of Appeals' refusal to review and determine Petitioner's challenge of the lower court and its own jurisdiction under OCGA § 9-11-60(d), resulted in a direct infringement upon Petitioner's right to immediate custody and control of the minor child as constitutionally protected by the Fourteenth Amendment of the United States Constitution. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

3. Additionally, the case at bar presents a question not previously decided by this court. The National Conference of Commissioners on Uniform State Laws, ("NCCUSL"), in response to constant relitigation of custody, enacted the Uniform Child Custody Jurisdiction Act in 1968. ("UCCJA") The UCCJA is now repealed by the Uniform Child Custody Jurisdiction and Enforcement Act. ("UCCJEA"). Since its passage in 1997, 48 states have adopted the UCCJEA with two states pending enactment.[5] The passage of the UCCJEA, prioritizes that only one state, the initial home state, can have exclusive continuing jurisdiction to modify its own

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5 *NCCUSL* facts: www.nccusl.org/nccusl/uniformat_factsheets/uniformacts-fs-uccjea.asp

custody order.[6] Due to this amended provision, a state's improper assertion of subject matter jurisdiction over interstate custody matters can be, has been, and will be, as demonstrated in this instant case, appealed. The paramount issue is whether after the question of jurisdiction and all other issues are decided adversely against the losing party in the rendering state, which was final between the two parties for that particular proceeding, are entitled to full faith and credit in the forum state. And if decided in the affirmative, in this instance case, should Petitioner—as the minor child's legal custodian—have therefore been entitled to immediate custody and control of the minor child, following the domestication of New Jersey's final decree vacating the void order upon which Respondent's custodial rights have been upheld in the state of Georgia for three years.

This honorable Court is being petitioned to grant Certiorari and to provide guidance as to whether judgments deciding a question of jurisdiction and the issues stipulated therein by the rendering state, should be afforded full faith and credit under Art. IV, § 1 of the United States Constitution in a forum state. This Court should grant certiorari in this case to consider a question important to the administration of justice in our federal system. See *Durfee*, 375 U.S. at 109.

REASONS FOR GRANTING THE PETITION

I. REVIEW OF THE APPLICATION OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION TO JUDICIAL PROCEEDINGS

Article IV, § 1 of the United States Constitution directs that "Full Faith and Credit shall be given in each state to the Public Acts, Records, and Judicial Proceedings of every other state." By the Act of June 25, 1948, c. 646, 62 Stat. 947, 28 U.S.C.A., § 1738,[7]

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[6] *See* Pet. App. 107-108a.

[7] The progenitor of the present statute was the Act of May 26, 1790, 1 Stat. 122, as amended, R.S. § 905, 28 U.S.C. § 687.

Congress provided that judgments ... "shall have such faith and credit given to them in every court within the United States ... as they have by law or usage in the courts of the state ... from which they are taken."

In drafting the Full Faith and Credit Clause, the Framers of the Constitution were motivated by a desire to unify their new country while preserving the autonomy of the states. To that end, they sought to guarantee that judgments rendered by the courts of one state would not be ignored by the courts of other states. The Supreme Court reiterated the Framers' intent when it held that the Full Faith and Credit Clause precluded any further litigation of a question previously decided by an Illinois court in *Milwaukee County v. M. E. White Co.*, 296 U. S. 268, 56 S. Ct. 229, 80 L. Ed. 220 (1935). The Court held that by including the clause in the Constitution, the Framers intended to make the states "integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin." *Id.*, 296 U. S. at 277.

A judgment from a sister state must be given full faith and credit even though the cause of action merged in the judgment could not have been enforced in the state where the enforcement of the judgment is sought. *Fauntleroy v. Lum*, 210 U. S. 230, 28 S. Ct. 641, 52 L.Ed. 1039, 1042 (1908); *Riley v. New York Trust Co.*, 315 U. S. 432, 62 S. Ct. 608, 86 L.Ed. 885 (1942). The denial of full faith and credit to a judgment from a sister state is not justified even when the rendering court made a mistake in interpreting the law of the second state, *Id.*, 210 U. S. at 237. As stated in *Marin v. Augedahl*, 247 U. S. 142, 149, 38 S. Ct. 452, 454, 62 L.Ed. 1038, 1042 (1918), "whether the decision was right or wrong is not open to discussion here. If wrong it was subject to correction on proper application to the court which made it, or on appeal, but it was not void or open to collateral attack." *Id.*, 247 U. S. at 149.

In the case of *Scotland County v. Hill*, 132 U. S. 107, (1889) this Court held that:

> An adjudication in a State court which binds the plaintiff, whether it is right or wrong, concludes him until it has been reversed or set aside. It can not be disregarded any more in the courts of the United States than those of the State.

Id., 132 U. S. at 114. (quoting *Scotland County v. Hill*, 112 U. S. at 187 (1884)).

1. A major requirement for according full faith and credit to a judgment or decree is that it be a valid and final judgment or decree having a res judicata effect in the state of its rendition. As stated by this Court, "a judgment from the rendering state controls in other states to the same extent as it does in the state where rendered.[8]

The Full Faith and Credit Clause "generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the state which rendered it." *Durfee v. Duke*, 375 U.S. 106, 109 (1963); see also *Riley v. New York Trust Co.*, 315 U.S. at 349 ("By the Constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, become a part of national jurisprudence. . . ."); 18B Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 4467, at 14 (2d ed. 2002) (describing the Full Faith and Credit Clause, as implemented by federal statute, as the "vehicle for exporting local res judicata policy to other tribunals"). This "does not mean that States must adopt the practices of other States regarding the time, manner, and mechanisms for enforcing judgments. Enforcement measures do not travel with the sister state judgment as preclusive effects do;

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[8] *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 Sup. Ct. 608, 612, 86 L.Ed. 885, 891 (1942).

such measures remain subject to the evenhanded control of forum law." *Baker v. General Motors Corp.*, 522 U.S. 222, 235 (1998); see also Restatement (Second) of Conflict of Laws § 99 (1971).

2. In contrast, non-final judgments under the laws of the state whose court granted them have not been entitled to full faith and credit in a sister state. The Supreme Court has said:

> ... "[A] judgment has no constitutional claim to a more conclusive or final effect in the state of the forum that it has in the state where rendered ... [I]t is clear that the state of the forum has as much leeway to disregard the judgment, to qualify it, or to depart from it as does the state where it was rendered." See *New York ex. Re. Halvey v. Halvey*, 330 U. S. at 615 (1947).

The New Jersey judgment in this instant case was a final judgment, satisfied due process, and therefore, should have been accorded full faith and credit under the United States Constitution.

II. GEORGIA ERRED IN FAILING TO EXTEND FULL FAITH AND CREDIT TO THE NEW JERSEY DECREE SINCE THE NEW JERSEY DECREE MET ALL CRITERIA REQUIRED FOR ITS APPLICATION

1. Full faith and credit will not be afforded where a judgment of a sister state is based solely on a lack of subject matter or personal jurisdiction in the court of the first state. As held in *Estin v. Estin*, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561, 1568 (1948), "A judgment of a court having no jurisdiction to render it is not entitled to the full faith and credit which the Constitution and statutes of the United States demand." *Estin, supra.*, 334 U. S. at 548. However, if the judgment on its face appears to be a record of a court of *general* jurisdiction, such jurisdiction over the cause and the parties is presumed unless disproved by extrinsic evidence or by the record itself. *Adam v. Saenger*, 303 U.S. 59, 62 (1938).

The Court of Appeals in New Jersey is a court of *general* jurisdiction and thus was justified in its exercise of jurisdiction to vacate the judgment rendered by its lower court.[9] Pet. App. 29a. This Court's analysis, as outlined in *Ford v. Ford*, 371 U.S. 187, (1962), held that in order to ascertain the effect of finality of a foreign judgment, the law determining such finality in the rendering state controlled.[10] The uncontroverted facts that: (a) the New Jersey Court of Appeals is a court of general jurisdiction; (b) respondent initiated his petition in the Essex County Superior Court of New Jersey, Pet. App. 25a, and (c) since respondent did not contest the effect of the New Jersey Appellate judgment; rendered such judgment final and conclusive between the parties. See *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931)[11] "Whatever is matter of law in the court appealed from is matter of law here, and whatever was matter of fact in the court appealed from is matter of fact here." Adam, *supra.*, 303 U. S. at 63 (quoting *Hanley v. Donoghue*, 116 U. S. at 6 (1885)).

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[9] *N.J. Const. Art. VI, § III, Para.* 2: "The Superior Court shall have original general jurisdiction throughout the State in all causes."

N.J. Const. Art. VI, §III. Para. 3 amended effective December 8, 1983: "[T]he Superior Court shall be divided into an Appellate Division, a Law Division, and a Chancery Division..."

[10] "The Full Faith and Credit Clause ... would require South Carolina to recognize the Virginia order as binding *only if a Virginia court would be bound by it*. Recognizing this, the South Carolina Supreme Court's opinion was largely devoted to a review of Virginia cases to determine the *effect in Virginia of the order of dismissal*." *Id.*, 371 U.S. at 192.

[11] "Public policy dictates that there be an end of litigation; that those who have contested on issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties ... where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause." *Baldwin*, supra. at 526.

BLACK'S LAW DICTIONARY, (6th ed. 1990), defines res judicata as: "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. Rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies..." The undisputed facts on record further show that the New Jersey Appellate court's opinion succinctly stipulated that Respondent's petition for custody was dismissed which was adjudicated as final. Pet. App. 26a. New Jersey Rule 4:37-2 (d), Involuntary dismissal, provides:

> (d) Dismissal With Prejudice; Exceptions. Unless the order of dismissal otherwise specifies, a dismissal under R. 4:37-2(b) or (c) and any dismissal not specifically provided for by R. 4:37, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits.

The New Jersey Court of Appeals judgment, which was refused full faith and credit by the Georgia courts, was not a judgment falling into any of the categories listed above. (i.e., lack of subject matter or personal jurisdiction, interlocutory in nature, etc). The mandate under the New Jersey Court of Appeals judgment was that the Respondent no longer was the custodian of the minor child. Petitioner therefore, was entitled to the right of immediate custody and control over the minor child per "unveiling" of the New Jersey void order, as Petitioner's status reverted to that of sole custodian per the unmodified, original 2002 Georgia custody order. OCGA § 19-9-45.[12] Pet. App. 36a.

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[12] OCGA § 19-9-45 provides: "A child custody determination made by a court of this state that had jurisdiction under this article binds all persons who have been served in accordance with the laws of this state or notified in accordance with Code Section 19-9-47... [A]s to those person , the determination is conclusive as to all decided issues of law and fact except to the extent the determination is modified.

A. The Georgia Court of Appeals decision is in direct conflict with this Court's pronouncements in *Forsyth*.

In *Forsyth v. Hammond*, 166 U.S. 506 (1897), respondent Caroline M. Forsyth sought by injunction in the federal court to forbid the City of Hammond, Indiana, from collecting taxes on certain land annexed to the city by an earlier state court decree. The city contended that the earlier decree was res judicata and decisive of the injunction case and the respondent contended that it was void because the enlargement of a city was a matter of legislative rather than judicial cognizance. This Court upheld the contention of the city on the ground that the respondent had taken an appeal to the Supreme Court of Indiana from the earlier decree of the trial court against her in the annexation proceedings and had in that appeal attacked the validity of the decree on the ground of lack of jurisdiction. This Court said:

> "If action by the state tribunals stopped with the decree of the trial court, it might be said that the plaintiff did not voluntarily seek that forum. She was brought in by appropriate process, and compelled to there litigate the question. But after an adverse decree she insisted that it was not only erroneous but void, and voluntarily commenced an action in the supreme court of the state to have that claim established. She invoked the jurisdiction of that court. She summoned the city of Hammond into that forum and there challenged the decree of the circuit court, challenged it for error and also for lack of jurisdiction. The questions both of error and of jurisdiction were certainly judicial in their nature and questions within the undoubted cognizance of the supreme court. She voluntarily sought its judgment. Can she, after its decision, be heard in any other tribunal to collaterally deny the validity thereof? Does not the principles of *res judicata*

> apply in all its force? Having litigated a question in one competent tribunal and been defeated, can she litigate the same question in another tribunal, acting independently, and having no appellate jurisdiction? *** The principles controlling the doctrine of *res judicata* have been so often announced, and are so universally recognized, that the citation of authorities is scarcely necessary. Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

Forsyth, at 517, 518 of 166 U.S., pages 1099 and 1100 of 41 L. Ed.

It is uncontroverted that Respondent *initiated* the claim for modification of custody in the State of New Jersey. Pet. App. 25a. Additionally, Respondent chose not to participate and defend in the appeal process. Pet. App. 23a. Respondent did not especially plead lack of personal or subject matter jurisdiction over the New Jersey Appellate court decree. Respondent's failure to raise such defenses; thereby rendered the judgment of the New Jersey Court of Appeals final.[13] Accordingly, due process was met in this instant case.[14]

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[13] *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, (84 L.Ed. 329) (1940) (" ... [T]here was no attempt to review the decree. If the general principles governing the defense of res judicata are applicable, these bondholders, having the opportunity to raise the question of invalidity, were not the less bound by the decree because they failed to raise it." See *Cromwell v. County of Sac*, 94 U.S. 351, 352, (1876) (emphasis at *Id.* at 371)

[14] *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, (1945) (the Court decided that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' ") *Id.* at 316.

B. Georgia's construction of their Uniform Enforcement of Foreign Judgments Law mandated Full Faith and Credit of the United States Constitution upon proper domestication of a foreign judgment.

1. The Uniform Enforcement of Foreign Judgments Law provides the mechanism to domesticate a foreign judgment for the purposes of full faith and credit.

In 1986, Georgia enacted SB 164, O.G.C.A. 9-12-130 et seq. ("the Uniform Enforcement of Foreign Judgment Law). The legislative history of SB 164 indicates that such law is to "relieve congested court dockets by reducing the number of cases arising under the **constitutional requirement** that full faith and credit be given to the judgments of courts of other states."[15]

1. OCGA § 9-12-130 et seq. is the Georgia codification of their Uniform Enforcement of Foreign Judgments Law, enacted by Ga. L. 196, p. 380, 1. The Georgia Legislature, by enacting the Uniform Enforcement of Foreign Judgments Law ("Act"), intended to make the law of those states which enact it uniform. This procedure is relatively simple. By filing an authenticated foreign judgment, affidavit, and filing fee,[16] a foreign judgment is thereafter given the effect as a final judgment under Georgia. OCGA § 9-12-132. Pet. App. 4a, 20-22a. Since the adoption of the Act, Georgia, as evident by its application and construction of prior cases brought under the Act, has repeatedly held that foreign judgments properly domesticated under the Act, are

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[15] *HeinOnline* - 2 Ga. St. U. L. Rev. 148 1985-1986 (emphasis added).

[16] *See OCGA* § 9-12-132; § 9-12-133; § 9-12-135

constitutionally protected under the Full Faith and Credit Clause of the United States Constitution.[17]

For purposes of clarity, Petitioner cites to *Okekpe v. Commerce Funding Corp.*, 218 Ga. App. 705, (463 S.E. 2d 23), (1995). This case was a dismissal from the denial of *Okekpe's* motion for relief from a foreign judgment rendered in Virginia based on lack of personal jurisdiction. Upon appeal it was determined that no proper notice of appeal was filed therefore barring discretionary review of the subject matter of the case and it was dismissed. *infra* at 25. Though factually distinguishable from the case at bar, Chief Judge Beasley's special concurrence concisely outlines Petitioner's position. He stated:

> "... [D]oes the filing of the foreign judgment in Georgia qualify the Georgia court as "the court of rendition" because now it is a Georgia judgment? That is precisely what is intended by OCGA § 9-12-132, *after* Georgia has given the foreign judgment "full faith and credit" by its filing. OCGA § 9-12-131.
>
> This is so even though the Georgia court in which it is filed does not "render" any judgment at all; nothing in the Uniform Law contemplates such.

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[17] *See Dropkin v. Dropkin*, 237 Ga. 768, (229 S.E.2d 621)(1976); *Kaylor et al. v. Turner et al.*, 210 Ga. App. 2, (435 S.E.2d 233) (1993); *Chambers v. Navarc*, 231 Ga. App. 318, (98 FCDR 1339) (1998); *E. Howard St. Clair & Associates, Inc. v. Northwest Carpets, Inc.*, 237 Ga. App. 537, (99 FCDR 1557), (515 S.E.2d 660) (1999); *Chrison v. H & H Interiors, Inc. et al;. Holt v. Chrison*, 232 Ga. App. 45, (500 S.E.2d 41) (1998); *A. A. A., Inc. v. Lindberg*, 172 Ga. App. 753 (324 S.E.2d 480) (1984), "Under the full faith and credit clause of the United States Constitution, . . . a judgment of a foreign court will be enforced by the courts of this state unless it is shown that the foreign court lacked jurisdiction of the person or subject matter or that the judgment was procured by fraud."

> Instead, the foreign judgment itself is acted upon. With respect to it, it would appear that there cannot be two courts of rendition, and the fact that it is filed in Georgia does not eliminate the foreign court as the court rendering the judgment. However, for purposes of enforcement *in Georgia,* though not elsewhere, the Georgia court is considered a court of rendition in OCGA § 9-11-60(d) ..."

Id., 463 S.E. 2d at 29.

2. OCGA § 9-11-60(d) provides the means by which a foreign judgment may be attacked

OCGA § 9-11-60 is the statutory provision to obtain relief from judgments in Georgia. Pet. App. 35. Thus, due to the very nature of a judgment obtained outside of Georgia then domesticated in a Georgia court, OCGA § 9-11-60(d) provides a narrower scope for relief from a foreign judgment.[18] *Williams v. American Credit Services, Inc.*, 229 Ga. App. 801, (495 S.E.2d 121) (1997), further clarifies the effect of a foreign judgment domesticated in Georgia. Judge Ruffin concisely stated:

> [T]urning to the merits, we note that a party can domesticate and enforce a foreign judgment in Georgia by following the procedures of the Uniform Enforcement of Foreign Judgments Law ("UEFJL"), OCGA § 9-12-130 et seq. "[This] uniform law provides a summary procedure for endowing a filed foreign

[18] *See Aqua Sun Investments, Inc. v. Kendrick*, 524 SE 2d at 521 Ga. App. (1999), "The standard for setting aside a foreign judgment is the same as that of OCGA § 9-11-60(d)." (quoting *Arnold v. Brundidge Banking Company*, 209 Ga. App. at 279 (1993)."

> judgment with the same effect as a judgment of the [Georgia] court in which it is filed. [Cit.] It is not a new action but merely picks up where it was left off in the state where rendered." *Wright v. Trust Co. Bank*, 219 Ga. App. 551, (466 S.E.2d 74) (1995).

Id. 495 S.E.2d at 122. (emphasis added).

This case, though strikingly similar as to facts and nature of the underlying issue, is yet distinguishable from *Webb v. Webb*, 451 U.S. 493, 495-98 (1981). As an illustration, at the time of *Webb*, supra, the Georgia's Uniform Enforcement of Foreign Judgments Law had not been enacted,[19] nor had the Uniform Child Custody Jurisdiction and Enforcement Act[20] been proclaimed. In addition, where *Webb* failed to cite to the United States Constitution in support of a federal violation under the Full Faith and Credit Clause, *Ibid*, 451 U.S. at 502; Petitioner, in the case at bar, *did in fact cite* to the constitutional provision under Article IV, § 1 and Georgia's violation of said provision therein. Pet. App. 61a, 63a, 95-97a. Petitioner contends that the Georgia Court of Appeals nor the Supreme Court of Georgia's "silence" by failing to pass upon the federal question could not have been supported by a finding that the federal claim was not presented clearly, therefore; sufficient to confer jurisdiction on this Court to pass upon the controversy. *Adams v. Robertson*, 520 U.S. 83, 89 n. 3 (1997) (per curiam) (concluding that "passing invocations of 'due process' "that 'fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment' do not "meet our minimal requirement that it must be clear that a federal claim was presented.").

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[19] *See* Ga. L. 1986, p. 380, 1.

[20] *See* Pet. App. 104-108, 109-114a.

III. THE GEORGIA COURT OF APPEALS ACTED *ULTRA VIRES* IN REACHING THE MERITS AND FAILING TO PASS UPON CHALLENGE TO GEORGIA'S LOWER COURT'S LACK OF JURISDICTION UNDER OCGA 9-11-60(D) IN VIOLATION OF ART. VI, CL. 2.

"This Court's insistence that proper jurisdiction appear begins at least as early as 1804 ..." *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 95 (1998) (citing *Capron v. Van Noorden*, 6 U.S. 126, (2 Cranch 126) (1804)) (By setting aside a judgment for the defendant at the instance of the losing plaintiff *who had himself* failed to allege the basis for federal jurisdiction). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869). *Ibid*, 523 U.S. at 94. "On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co.* v. *Jones, supra*, at 453. Pet. App. 74a.

In *Haywood v. Drown*, (No. 07-10374), 556 US ___, 129 S. Ct 2108 (2009), (Thomas, J. dissenting) stated, ([T]he role of the Supremacy Clause is no different. It does not require state courts to entertain federal causes of action. Rather, it only requires that *in reaching the merits of such claims, state courts must decide the legal question in favor of the "law of the Land."*) Art. VI, cl. 2.

The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. Under this provision, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of jurisprudence, which constitutes the law of the land for the State." *Claflin*, 93 U. S., at 136–137; see also *Gregory* v. *Ashcroft*, 501 U. S. 452, 460 (1991); *Robb* v. *Connolly*, 111 U. S. 624, 637 (1884). Thus, a valid federal law is substantively superior to a state law; "if a state measure conflicts with a federal requirement, the state provision must give way." *Swift & Co.* v. *Wickham*, 382 U. S. 111, 120 (1965). As a textual matter, however, the Supremacy Clause does not address whether a state court must entertain a federal cause of action; it provides only a rule of decision that the state court must follow *if* it adjudicates the claim. See R. Berger, *Congress v. The Supreme Court* 245 (1969) (The Supremacy Clause only "'enacts what the law shall be'. . . .[I]t defines the governing 'supreme law,' and *if* a State court *has* jurisdiction, it commands that that law shall govern"). Pet. App. 100-101a.

The Georgia courts at the trial, appellate, and Supreme Court level, have blatantly refused to adhere to their own statutory provisions and this Court's long established precedence on determining jurisdiction *before* proceeding to the merits in this instant case. *See Clow v. US Dept. of Housing & Urban Dev.*, 948 F. 2d 614, (1991) (O'Scannlain, J., dissenting) *Ibid*, 948 F. 2d, at 626. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382 (1884). `And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower

court in entertaining the suit.' *United States* v. *Corrick*, 298 U.S. 435, 440 (1936) (footnotes omitted). Pet. App. 78a, 101a.

Because this case is about a child being withheld under a void order from her legal custodian whose liberty right to such child is constitutionally protected by the Fourteenth Amendment of the United States Constitution, *Troxel v. Granville*, 530 U.S. 57, 65 (2000), the pronouncement of Justice Scalia in *Steel Co.*, should not ring hollow:

> "[M]uch more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. See *United States* v. *Richardson*, 418 U.S. 166, 179 (1974); *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U. S. 208, 227 (1974). For a court to pronounce upon the meaning or the constitutionality of a *state* or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.

Steel Co., supra, 523 U.S. 83 at 101-102.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted
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FIRST DIVISION
MILLER, C. J.
ANDREWS, P. J., and BARNES, J.

NOTICE: Motions for reconsideration must be physically received in our clerk's office within ten days of the date of decision to be deemed timely filed. (Court of Appeals Rule 4 (b) and Rule 37 (b), February 21, 2008)

March 3, 2010

In the Court of Appeals of Georgia.

A09A1934. LYNCH v. HORTON

MILLER, Chief Judge.

After a New Jersey appellate court vacated a trial court's custody award to Chesare Horton on jurisdictional grounds, Horton filed a petition for modification of custody, visitation and child support against Deborah Hinton-Lynch in Cobb County, seeking custody of their minor daughter. The trial court awarded sole custody of the child to Horton, and Lynch appeals, arguing that the trial court erred in granting Horton's petition because (i) Horton did not move to set aside the domesticated New Jersey judgment; (ii) Horton filed his petition as a counterclaim; (iii) the trial court failed to find that Horton had unclean hands notwithstanding evidence that he took the child across state lines, in violation of Lynch's custodial rights; and (iv) Horton failed to prove a material change of circumstances affecting the minor child to warrant a change in custody. Finding the existence of material conditions affecting the child's welfare which would warrant a change of

custody and promote the child's best interest, we affirm the trial court's order modifying custody.

We will affirm a trial court's decision on a petition to change custody if there is any reasonable evidence in the record to support it. See *Mitcham v. Spry*, 300 Ga. App. 386, 685 S.E.2d 374 (2009). "When reviewing a child custody decision, this [C]ourt views the evidence presented in the light most favorable to upholding the trial court's order." (Footnote omitted.) Id.

So viewed, the evidence shows that Lynch and Horton are the parents of a minor daughter, T.H. Horton filed a petition to legitimate T.H., and in 2002, the trial court issued an order declaring T.H. to be Horton legitimate child; awarding Lynch sole custody; and granting Horton supervised visitation for two years, followed by unsupervised visitation. By separate consent order, Horton was obligated to pay child support to Lynch. Later in 2002, Lynch moved to New Jersey. Thereafter, on several occasions, Horton had little or no visitation with T.H. because Lynch was either not at home or had moved when he traveled from Georgia to New Jersey to visit with the child. Nor did Lynch communicate with Horton or return his phone calls. In October 2004, when Lynch took T.H. to her mother and stepfather's home in North Carolina, she failed to inform Horton of such fact. T.H. remained with Lynch's mother and stepfather until late January 2005.

In October 2004, Lynch filed a petition in New Jersey to reinstate Horton's supervised visitation, alleging that Horton had left T.H. in the care of his 12-year-old daughter and had smoked in the presence of T.H., who had asthma. Lynch's petition was scheduled for a hearing on January 30, 2005, but Lynch failed to appear, and the trial court issued a bench warrant for her arrest. The New Jersey trial court rescheduled the hearing for the following day and allowed Horton to appear by phone. On that

same day, Lynch's mother's husband, Bruce Frierson, called Horton to inquire about his whereabouts. Based on that telephone call, Horton picked up T.H. from Lynch's mother's house in North Carolina and returned to Georgia with the child.

On January 31, 2005, the New Jersey trial court denied Lynch's petition and entered an order finding that Lynch had no standing to modify Horton's visitation because she had relinquished custody of the child to "someone outside the Court's order," i.e., Lynch's mother. The New Jersey trial court then allowed T.H. to remain with Horton, given that she had been staying with him since the previous day when he picked up T.H. from Lynch's mother's house in North Carolina.

In February 2005, Lynch went to Horton's residence in Georgia, accompanied by Cobb County law enforcement, and presented Horton with a forged court order purporting to modify the New Jersey order entered on January 31, 2005 and to award custody of T.H. to Lynch. Horton convinced the police that the order appeared to be inauthentic, and the police did not remove the child from Horton's home. On March 3, 2005, at the direction of the New Jersey trial court, Horton filed a petition to modify custody. Following a hearing on March 17, 2005, at which neither Lynch nor her attorney appeared, the New Jersey trial court granted custody of the minor child to Horton and awarded supervised visitation to Lynch ("New Jersey order").

On July 8, 2005, Lynch filed a petition to modify custody in Cobb County, which the trial court denied. Thereafter, Lynch filed a motion to vacate and set aside the New Jersey order, and on September 23, 2008, a New Jersey appellate court concluded that the New Jersey trial court lacked jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act to modify custody in Horton's favor, vacated the New Jersey order and directed dismissal of Horton's petition for change of

custody. On September 24 and 25, 2008, Lynch filed actions to domesticate the New Jersey final judgment of dismissal in Cobb County. On September 25, 2008, Lynch advised Horton that she planned to pick up the child. In response, Horton filed a motion for emergency temporary custody of the child and a petition for modification of custody in Cobb County. The trial court issued an order granting immediate emergency custody of the child to Horton, and in December 2008, the trial court awarded sole custody of the child to Horton and supervised visitation to Lynch.

1. For the first time on appeal, Lynch argues that the trial court erred in modifying custody because Horton failed to set aside the domesticated New Jersey judgment and res judicata barred Horton from relitigating a second custody action between the parties. We disagree.

During the hearing on Horton's petition for modification of custody, Lynch failed to object to the proceedings on the grounds asserted above. Absent a contemporaneous objection, this enumeration of error presents nothing for appellate review. See *Bell v. Forster*, 211 Ga.App. 76, 438 S.E.2d 145 (1993) (where party failed to challenge trial court's grant of attorney fees based on quantum meruit, the issue was waived on appeal).

2. Lynch contends that the trial court erred in allowing Horton to bring his petition for modification of custody as a counterclaim. We are not persuaded. OCGA § 19-9-23(a) provides that "[e]xcept as otherwise provided in this Code section,... any complaint seeking to obtain a change of legal custody of the child shall be brought as a separate action in the county of residence of the legal custodian of the child."[1] [1]OCGA § 19-9-23(c) prohibits bringing a

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[1] Lynch appears to be a resident of Maryland, but she does not claim that venue was improper in Cobb County. Nor did Lynch preserve this defense in her answer. Therefore, we need not consider this issue.

complaint seeking to change legal custody "in response to any other action...." It is well settled that "this statute precludes a counterclaim seeking a change in custody." (Citations omitted.) *Seeley v. Seeley*, 282 Ga.App. 394, 396(1), 638 S.E.2d 837 (2006).

On September 24 and 25, 2008, Lynch filed actions to domesticate the final judgment in the New Jersey proceedings in Cobb County. See *Wylie v. Blatchley*, 237 Ga.App. 563, 564(1), 515 S.E.2d 855 (1999); OCGA §§ 9-12-130; 9-12-133. On September 25, 2008, Horton filed his petition for modification of custody and a motion for emergency temporary custody order. Lynch thereafter filed an answer and affirmative defenses to Horton's petition for modification of custody. We cannot conclude from this record that Horton's petition was filed in response to Lynch's action to domesticate the foreign judgment since Horton's petition bears a different case number from Lynch's petitions and the parties' actions were filed almost simultaneously. See *Armstrong v. Rapson*, 299 Ga.App. 884, 885, 683 S.E.2d 915 (2009) (where party failed to show error affirmatively from the record, appellate court assumes the judgment below was correct).

3. The trial court's finding to the contrary notwithstanding, Lynch argues that Horton had unclean hands because he took the child from her mother and stepfather's house in North Carolina to Georgia when she had lawful custody of the child. Lynch therefore claims the trial court's grant of Horton's petition violated public policy and the unclean hands doctrine under OCGA § 23-1-10 should apply. We disagree.

The unclean hands maxim as set forth in OCGA § 23-1-10 applies to equitable rights which relate directly to the cause of action. *Zaglin v. Atlanta Army Navy Store*, 275 Ga.App. 855, 858(2), 622 S.E.2d 73 (2005). "[This] rule regarding

equitable rights[, however,] does not apply in child custody cases." *Green v. Krebs*, 245 Ga.App. 756, 760(4), 538 S.E.2d 832 (2000)[2] While the trial court is charged with the duty "to exercise its discretion to look to and determine solely what is for the best interest of the child ... and what will best promote [her] welfare and happiness[,]" the fact that Horton took T.H. from Lynch's mother and step-father with their consent does not mandate a finding that Lynch retain custody of T.H. (Punctuation and footnote omitted.) Id.; OCGA § 19-9-3(a)(2). Further, the trial court was authorized to consider Horton's good faith in picking up T.H. after receiving a telephone call from Frierson concerning his lack of contact 38*38 with the child and learning of T.H.'s whereabouts.

4. Lynch argues that the trial court abused its discretion by awarding custody of the child to Horton because the evidence failed to show a material change in circumstance affecting the child's welfare. We disagree.

"A petition to change child custody should be granted only if the trial court finds that there has been a material change of condition affecting the welfare of the child since the last custody award. If there has been such a change, then the court should base its new custody decision on the best interest of the child." (Footnote omitted.) *In Interest of T.S.*, 300 Ga.App. 788, 686 S.E.2d 402 (2009); OCGA § 19-9-3(a)(2). The trial court may consider a variety of relevant factors in determining the best interest of the child, such as:

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[2] Compare OCGA § 19-9-24 ("A physical custodian shall not be allowed to maintain against the legal custodian any action for ... change of child custody[] ... so long as custody of the child is withheld from the legal custodian in violation of the custody order."). We note that this statute was inapplicable once the Cobb trial court granted immediate emergency custody of T.H. to Horton. Nor does Lynch rely on this statute.

> (G) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity; ... (L) The home, school, and community record and history of the child[] ... (N) The willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent, consistent with the best interest of the child[.]

OCGA § 19-9-3(a)(3). The evidence sufficient to warrant a modification of custody can consist of a change in material conditions which have a positive effect on the child's welfare as well as changes which adversely affect the child. See OCGA § 19-9-3(b) (trial judge may modify custody "based upon a showing of a change in any material conditions or circumstances of a party or the child"); *Moses v. King*, 281 Ga.App. 687, 637 S.E.2d 97 (2006); *Weickert v. Weickert*, 268 Ga.App. 624, 627(1), 602 S.E.2d 337 (2004) (trial court is not required to find a material change for the worse in order to modify custody).

The record shows that the 2002 legitimation order was the last valid custody order. Thus, the burden was on Horton to prove a new and material change in circumstance which affected T.H.'s welfare since 2002. See *Martin v. Greco*, 225 Ga.App. 752, 753(1), 484 S.E.2d 789 (1997); OCGA § 19-9-3(b). The trial court granted Horton's petition and based its decision on the following findings of facts: (1) Lynch's abandonment of T.H. for several months in 2004; (2) Lynch's admitted forgery of a court order in an attempt to abscond with T.H.; and (3) T.H.'s continued residence with Horton in Cobb County for approximately three years and good performance in school. Considering the evidence, "we are mindful that the Solomonic task of assigning the custody of children lies squarely upon the shoulders of the judge who can see and hear the parties and their witnesses, observe their demeanor and attitudes,

and assess their credibility." *Mitcham*, supra, 300 Ga.App. at 386, 685 S.E.2d 374.

Pretermitting whether the trial court's finding of "abandonment" was correct, the trial court was faced with evidence that Lynch had left her daughter in the care of her mother and stepfather from October 2004 until January 2005 without notifying Horton of the child's whereabouts. Prior to, and during that time frame, Horton had virtually no contact with Lynch, which inhibited his visitation rights with T.H. The trial court was authorized to find that Lynch's act of leaving T.H. with her mother and stepfather without notice to Horton disrupted the stability of the child's environment, separating her from Lynch for a three-month period, and isolated the child from her father. Although the trial court did not specifically find that the denial of Horton's visitation rights was a change in condition, the import of the trial court's order supports such a finding. See *Jones v. Kimes*, 287 Ga.App. 526, 528, 652 S.E.2d 171 (2007) (repeated denial of the noncustodial parent's visitation rights may authorize a change of custody). We cannot conclude that the child's welfare was not adversely affected during this three-month period. Moreover, Lynch's failure to inform Horton of the child's whereabouts demonstrated her lack of willingness "to facilitate and encourage a close and continuing parent-child relationship between the child and [Horton], consistent with the best interest of the child[.]" OCGA § 19-9-3(a)(3)(N).

Further, in light of Lynch's forgery of a court order and admission to such crime, the trial court was authorized to conclude that Lynch's actions were of such "grave concern," showing her disregard for the law and the child's well-being. On the other hand, while continuously residing with Horton for more than three years, T.H. demonstrated academic excellence, maintaining an "A" average in school. The trial court could reasonably infer that T.H. was thriving in her father's care such that granting

custody to Horton promoted her best interest toward continued stability. OCGA § 19-9-3(a)(3)(G), (L). "[I]t is not our function to second-guess the trial court in cases such as this, which turn largely on questions of credibility and judgments as to the welfare of the child." *Green*, supra, 245 Ga.App. at 759, 538 S.E.2d 832. Although Horton's custody of T.H. was the result of a now-vacated New Jersey custody order, our decision is unaffected by this ruling because the order was reversed and vacated on jurisdictional grounds, not on the merits. At the direction of the New Jersey trial judge, Horton acted in good faith in filing a petition to change custody in New Jersey.

Accordingly, we conclude that the trial court did not abuse its discretion by modifying the prior custody order and granting custody of T.H. to Horton. *T.S.*, supra, 300 Ga.App. at 790(2), 686 S.E.2d 402.

Judgment affirmed. Andrews, P. J., and Barnes, J., Concur.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

CHESARE S. HORTON, *
Plaintiff, *
*
*
*
v. *
* Civil Action No. 08-1-8875-28
*
DEBORAH HINTON- *
LYNCH, *
Defendant. *
*
*

FINAL ORDER

The Petition to Modify Custody of Minor Child having come before the Court on December 10th, 2008 for a scheduled hearing with the parties having appeared, Plaintiff through counsel and Defendant appearing Pro Se, and upon consideration of this case, and upon evidence of this honorable court, THE COURT HEREBY FINDS AS FOLLOWS:

Procedural History and Findings of Fact

1.

The parties in this matter were never married and conceived a child, Tiffany Horton, who was born June 6, 2000.

2.

After the child's birth the parties resided together for a period of time.

3.

On February 25th, 2002 the Superior Court of Cobb County named Chesare Horton the Legal Father of the minor child pursuant to Civil Action Number 02-1-0393-28. Custody of the child was granted to the r having supervised visitation for 24 months and then unsupervised thereafter.

4.

On January 4th, 2005 in Essex County, New Jersey a hearing was scheduled in reference to visitation. Said hearing was sought by the Plaintiff and Plaintiff failed to appear. Defendant traveled from Cobb County, Georgia to appear. A bench warrant was issued for Plaintiff. Plaintiff turned herself in the following day. Defendant was permitted to appear by phone at the following hearing.

5.

On January 31st, 2005 the Superior Court of New Jersey issued an order relinquishing the Mother of Custody and leaving the child with the Father. The Court found that the Mother had relinquished her custodial rights to the maternal grandmother. The court found that the minor child had by Mother's admissions been left with the maternal grandmother at minimum since December 2004. The Father presented evidence that unbeknownst to him the child has actually been left with the maternal grandmother in North Carolina in January 2005 after receiving a call from the maternal grandmother's husband advising of the child's whereabouts.

6.

The Father in this matter filed an action for Custody in March 2005 in New Jersey which was the Mother's home State at the time and on March 17th, 2005 custody of the minor child was granted to the Father by the Superior Court of New Jersey. Pursuant to said Order the Mother was allowed only supervised visitation. The court based its decision on concerns of an alleged forged custody order that had been allegedly presented to authorities in Cobb County, Georgia by Mother in an attempt to abscond with the minor child. The child has remained in the continuous custody and care of the Father since that date.

7.

On June 2nd, 2005, a Motion for Reconsideration of the New Jersey Custody Order was denied by the Superior Court of New Jersey.

8.

On July 8th, 2005, a petition was filed in the Cobb County Superior Court requesting a modification of custody by the Mother. Said Petition was denied and the minor child remained with the Father pursuant to the New Jersey Custody Order.

9.

The mother subsequently filed a Habeas Petition before this court in 2006. An Order was issued by this court denying the Mother's Petition on August 9th, 2006. In that Order this court concluded that:

> "Were the New Jersey Order in fact void ab initio, which this court does not find, this Court would not grant Plaintiff a Writ of Habeas Corpus based on theories of her Laches and unclean hands and a consideration of the best interests of the child. This Court in October 2005 found that Plaintiff had attempted to obtain custody of

> the minor child of the parties by fraudulent and criminal means. This Court has concerns about the wellbeing of a child placed in the care of a person willing to go to such ends. In its Order of October 26th, 2005 this Court found that it was no appropriate to modify custody and those reasons still appear valid today."

It should be noted that at that time the Defendant Father had an Order for Custody from New Jersey.

10.

Since that Order the Mother has filed legal actions both in New Jersey and in Georgia attempting to regain custody.

11.

On September 10th, 2008 the Superior Court of New Jersey Appellate Division issued an Order vacating the prior Custody Orders of the New Jersey Court based on jurisdictional grounds.

12.

On September 24th, 2008 Father filed this action seeking to Modify Custody and Child Support as to maintain custody of the minor child and a hearing was held on December 11th, 2008.

13.

At the Hearing Mother once again testified and admitted while under oath to this court that she did in fact abandon the minor child with the child's maternal grandmother for several months prior to the Father taking custody of the child. She further admitted that she did not contact or advise the Father of the child's whereabouts.

14.

Mother further testified and admitted while under oath that in February, 2005 she forged a Custody Order which she admitted she created in order to present to the authorities in Georgia in an attempt to illegally obtain the minor child. She further admitted under oath to presenting this order to the authorities, and asking that they force the Father to give her the minor child. The authorities refused to force the Father to give up the minor child due to their concerns about the legitimacy of the order presented.

15.

This Court finds that the minor child has been residing with the Father since January 2005, and that the child is thriving while in his care. The Court finds that the child is excelling in school and is being well cared for while in the care of the Father. Furthermore, no credible evidence was submitted to establish that the Father is unfit or unable to care for the minor child.

Conclusions of Law and Order

16.

The court concludes and finds that there has been a material change in circumstance since the last Custody entered in Cobb County addressing custody which warrants a change of custody from the Mother to the Father.

17.

The court concludes a material change of circumstances warranting a change in custody occurred when the Mother abandoned the minor child with the child's maternal grandmother for several months in 2004 just prior to the Father obtaining a custody order from the State of New Jersey granting him custody of the minor child. The court finds that the surreptitious indefinite abandoning of the minor child with the maternal

grandparents created an emergency situation regarding the well being of the minor child.

18.

The court further concludes a material change in circumstances warranting a change in custody occurred as a result of the child residing with and being cared for by the Father for almost three years based upon a Custody Order entered by the New Jersey Superior Court in March of 2005. This custody Order was asked for and obtained in good faith by the Father from the New Jersey Superior Court and was not obtained through deceit, trickery, or chicanery. The Court does not find that the Father illegally withheld the minor child from the mother during this time.

19.

The court further concludes a material change in circumstances warranting a change in custody occurred when the Mother through deceitful actions forged a court order and presented same to law enforcement in an attempt to illegally obtain the child. The court further finds that such actions by the Mother are of grave concern, and such actions created an extreme emergency custodial situation concerning the well being of the child as it is apparent that the Mother is more than capable of absconding with the child.

20.

The court concludes and finds that based upon the above listed material changes, and other evidence presented, that the best interests of the child are to modify custody and award Father sole legal and physical custody.

21.

The court further concludes and finds that based upon the Mother's forging of a previous court's custody order, an her attempts to illegally abscond with the child, that is NOT in the child's best

interests for the Mother to have unsupervised visitation at this time. The Mother's previous actions have indicated her propensity to disregard a court's order and to attempt to abscond with the minor child in willful dereliction of a court's custody order.

22.

The court further concludes and finds that the Defenses presented by the Mother in this matter are without merit. The Defendant's arguments that the Father illegally retained the child and therefore has unclean hands is without merit. The Mother indefinitely abandoned the minor child with the child's maternal grandmother without advising the Father of the child's whereabouts creating an emergency situation which the Father rightfully rectified. The Father did not "snatch" the child away from the mother and attempt to present an action in his home State. Nor did the Father deceive the Mother into allowing him to have the child and then failing to return the child. The Father, in fact, after picking up the child from the child's maternal grandmother, obtained an Order awarding him custody from New Jersey where the mother lived at the time. When the New Jersey Custody Order was subsequently vacated on Jurisdictional grounds the Father immediately filed the present action in this court which the mother admits has Jurisdiction and is currently the proper court to hear this matter. To find that the Father should be barred from filing this action would in fact deny the Father any remedy or access to the courts. New Jersey has denied Jurisdiction, and the Mother has admitted in her Answer that Cobb County Superior Court has Jurisdiction over this matter.

IT IS THEREFORE HEREBY ORDERED as follows:

CUSTODY/PARENTING PLAN

23.

Custody is hereby changed and modified. The Father shall enjoy sole legal and physical custody of the parties' minor child, Tiffany Summer Rae Horton, born June 6th, 2000.

24.

The parties acknowledge that a close and continuing parent-child relationship and continuity in the child's life will be in the child's best interests. The child's needs will change and grow as the child matures and the parties will make an effort to parent the child in a way that takes this into account so that future modifications of this parenting plan are minimized.

The parties acknowledge that a close and continuing parent-child relationship and continuity in the child's life will be in the child's best interests. The child's needs will change and grow as the child matures and the parties will make an effort to parent the child in a way that takes into account so that future modifications of this parenting plan are minimized.

39.

Each party is herein ordered to obey each and every provision of this order from this date forth.

SO ORDERED, this the 18th day of Dec., 2008.

/s/ Mary Staley
Judge, Superior Court
Cobb County Judicial Circuit

Prepared by:

/s/ Anthony Hallmark
Anthony Hallmark
Attorney for Plaintiff
Georgia Bar Number. 319830
3818 Powder Springs Road
Powder Springs, Georgia 30127
(770) 943-1106

SUPREME COURT OF GEORGIA
Case No. S10C1216

Atlanta, September 07, 2010

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

DEBORAH HINTON-LYNCH v. CHESARE HORTON

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Court of Appeals Case No. A09A1934

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ **Theresa S. Barnes**, Clerk

SUPREME COURT OF GEORGIA
Case No. S10C1216

Atlanta, October 04, 2010

The Honorable Supreme Court met pursuant to adjournment. The following order was passed.

DEBORAH HINTON-LYNCH v. CHESARE HORTON

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ **Theresa S. Barnes**, Clerk

PETITION TO DOMESTICATE FOREIGN JUDGMENT

08-1-8843-28

Plaintiff, Deborah Hinton-Lynch, now comes forward this 24th day of September, 2008 to domesticate a foreign order from the New Jersey Appellate Division, vacating custody for Defendant, Chesare Horton, of minor child, Tiffany Summer-Raye Horton. This order directs that Defendat, relinquishes custody of Tiffany Horton to her legal custodian, Plaintiff, Deborah Hinton-Lynch immediately. The Cobb County Sheriff's department is direct to take action in helping Plaintiff facilitate removal of minor child, Tiffany Horton if defendant refuses to relinquish custody.

The New Jersey Appellate order supercedes any other subsequent orders and was effective the 23rd day of September, 2008, vacating New Jersey trial court order granting defendant, Chesare Horton custody.

Defendant:
Chesare Horton
3872 Morning Dew Way
Powder Springs, GA, 30127
678-524-7039 (cell)

Respectfully,
/s/ Deborah Hinton-Lynch Plaintiff
8601 Bovelder Dr.
Laurel, MD 20708
443-844-6934 (cell)

Filed In Office Sep-24-2008 14:19:57
ID# 2008-0138498-CV
Page 1
/s/ Jay C. Stephenson, Jay C. Stephenson
Clerk of Superior Court Cobb County

Filed In Office Sep-25-2008 09:10:30
ID# 2008-0138775-CV
Page 1
/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

Deborah Hinton-Lynch	)
Plaintiff,	)
	)
v.	) Civil Action File
	) No. 08-1-8843-8
Chesare Horton	)
Defendant	)

AFFIDAVIT TO DOMESTICATE FOREIGN JUDGMENT

COMES NOW the Plaintiff, acting *pro se*, and shows this Court pursuant to O.C.G.A. § 9-12-133 that the name and last known address of the parties is as follows:
Deborah Hinton-Lynch – 8601 Bovelder Dr, Laurel, MD 20708
Chesare Horton – 3872 Morning Dew Way, Powder Springs, GA 30127

The Plaintiff attaches hereto a properly authenticated copy of the judgment which it previously obtained against the Defendant in the State of New Jersey and requests that the Clerk will mail notice of this to the Defendant at the address shown.

Plaintiff accordingly requests that upon proper mailing that this judgment be domesticated herein and be made the judgment of this Court.

This the _____ day of _____, 20 _____.

/s/ Deborah Hinton-Lynch
Plaintiff *pro se*
Address: 8601 Bovelder Dr, Laurel, MD 20708
Telephone Number: 443 844 6934
ID. Maryland Drs License #139244955 Exp 12-16-2011
Sworn to and Subscribed before me this 25 day of September, 2008.
Notarizing Signature only
/s/ Retta McRee
Notary Public My commission expires March 18, 2011

Filed In Office Sep-24-2008 14:19:57
ID# 2008-0138499-CV
Page 1
/s/ Jay C. Stephenson
Jay C. Stephenson
Clerk of Superior Court Cobb County

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5859-06T1

DEBORAH HINTON-LYNCH,

Plaintiff-Appellant,
v.

CHESARE HORTON,
Defendant-Respondent.

Submitted September 10, 2008 - Decided September 23, 2008

Before Judges Fisher and Baxter.
On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FD-07-7465-03.

Deborah Hinton-Lynch, appellant pro se.
Respondent Chesare Horton has not filed a brief.

PER CURIAM

Before us is an appeal that requires consideration of whether the trial court had jurisdiction when it awarded custody of the parties' minor child to defendant. Because we conclude that the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), N.J.S.A. 2A:34-53 to -95, applies to the New Jersey proceedings in question, we reverse the order under review and direct a dismissal of defendant's custody petition.

At the present time, jurisdiction over child custody determinations is governed by the UCCJEA, which was adopted in New Jersey to be effective on December 13, 2004. See L. 2004, c. 147. Prior to that effective date, jurisdiction in such matters was governed by the Uniform Child Custody Jurisdiction Act (UCCJA), N.J.S.A. 2A:34-28 to -52. Because jurisdiction to modify a foreign custody order was more broadly permitted by the UCCJA than now permitted by the UCCJEA, an examination into the timing of the proceedings in question is warranted, as is a brief review of the procedural history of the litigation revolving around the child in question.

The record on appeal reveals that plaintiff Deborah Hinton-Lynch and defendant Chesare Horton are the parents of a minor daughter, who was born in New Jersey on June 6, 2000. Five months after the child's birth, Deborah and the child moved to Georgia, where Chesare had been residing since November 1999.

On March 27, 2002, a Georgia court entered a consent order that required Chesare pay to Deborah $504 per month in child support; the order expressly recognized that Deborah had custody of the child. The following month, the Georgia court granted Chesare's petition to legitimize the child; that order also granted him supervised visitation of the child, with the implicit recognition that Deborah had custody, with the expectation that the visits would be unsupervised after a two-year period.

In May 2002, Deborah returned to New Jersey with the child, and, on August 4, 2003, Deborah obtained an order that registered the Georgia orders in this State.

On October 27, 2004, Deborah filed a motion seeking to reinstate supervised visitation despite the passage of the two-year period referred to in the Georgia visitation order. Deborah based her position on the allegation that Chesare had permitted the child to go to a pool while only supervised by Chesare's twelve-year old daughter. She also alleged that Chesare smoked cigarettes near the child, who apparently suffers from asthma. A hearing on that matter was scheduled for January 4, 2005, but Deborah did not appear; she later asserted that she had mistakenly thought the hearing was scheduled for January 5, 2005. As a result of Deborah's failure to appear, the judge dismissed the application for a change in the visitation conditions.

The record on appeal further reveals that, on March 3, 2005, Chesare faxed a petition to the trial court for a change in custody of the child to him. It is the date of this submission, and not the consequences of the other proceedings and the many confusing circumstances, including Deborah's change of residence to Maryland in early 2005, that informs our decision in this case. Upon receipt of the custody complaint, the court scheduled a hearing for March 17, 2005. Deborah did not appear, later claiming that she had not received notice. Her attorney, who indicated he was unaware of the scheduling of the custody hearing, sought and was granted leave to withdraw. Thus, in the absence of either Deborah or her attorney, the trial judge granted custody of the child to defendant as memorialized by her order of March 17, 2005.

Thereafter, following her unsuccessful request for relief in a Georgia court, Deborah sought in the

trial court in this matter, among other things, an order vacating the order of March 17, 2005, claiming that our courts lacked jurisdiction over the custody order entered in Georgia in 2002. The trial judge concluded that New Jersey had jurisdiction and that the Georgia court acknowledged this when Deborah failed to obtain relief in Georgia on August 9, 2006, although the judge then indicated that exclusive jurisdiction would be relinquished to Georgia, which the judge acknowledged was the child's home state. The judge memorialized these determinations in an order entered on June 22, 2007.

Deborah appealed, raising the following arguments for our consideration:

I. THE TRIAL COURT VIOLATED PLAINTIFF'S DUE PROCESS GUARANTEED UNDER THE FOURTEENTH AMENDMENT.

A. The trial court erred in allowing ex parte communication in the absence of opposing party.

B. The trial court lacked personal jurisdiction over plaintiff at final hearing rendering custody order void.

II. THE TRIAL COURT LACKED AUTHORITY TO ASSUME JURISDICTION TO MODIFY ANOTHER STATE'S ORDER.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED ERROR BY MAKING NO CONCLUSIONS OF LAW EXPLAINING ITS DECISION DENYING THE PLAINTIFF'S MOTION TO VACATE ORDERS GRANTING DEFENDANT CUSTODY.

We agree that our courts lacked subject matter jurisdiction over the custody issues and reverse. Accordingly, we need not address the other issues raised by Deborah regarding the manner in which the proceedings were conducted in the trial court or the sufficiency of the trial judge's decision.

Because Chesare's application for a change in custody was submitted to the trial court after the effective date of the UCCJEA, and because the earlier New Jersey proceedings regarding Deborah's visitation application cannot be equated with a child custody application, New Jersey's jurisdiction over Chesare's application is determined by resort to the UCCJEA. See Griffith v. Tressel, 394 N.J. Super. 128, 137-38 (App. Div. 2007). The UCCJEA as adopted here and in Georgia mandates that:

> a court of this State that has made a child custody determination consistent with [N.J.S.A. 2A:24-65 or N.J.S.A. 2A:34-67] has exclusive, continuing jurisdiction over the determination until:
>
> (1) a court of this State determines that neither the child, the child and one parent, nor the child and a person acting as a parent have significant connection with this State and that substantial evidence is no longer available in this State concerning the child's care, protection, training and personal relationships; or
>
> (2) a court of this State or a court of another state determines that neither the child, nor a parent, nor any person acting as a parent presently resides in this State.
>
> [N.J.S.A. 2A:34-66(a); accord Ga. Code Ann. § 19 9 62.]

As is plainly apparent, only Georgia, once having issued the original custody order, had the authority to determine whether it had lost subject matter jurisdiction over the child in question.

Here, the record reveals that, on March 27, 2002, a court in Georgia determined that Deborah had and would continue to have custody of the child. Nothing contained in the record on appeal reveals to us that Georgia ever relinquished its exclusive, continuing jurisdiction over that order prior to the custody order now under review. Accordingly, this aspect of the UCCJEA precluded the trial court's exercise of jurisdiction over custody of the child in question.

A review of N.J.S.A. 2A:34-67, which provides limited authority for a court of this State to modify a foreign custody order, also demonstrates that the trial court did not possess subject matter jurisdiction. This provision states that

> a court of this State may not modify a child custody determination made by a court of another state unless a court of this State has jurisdiction to make an initial determination under paragraph (1) or (2) of subsection a. of [N.J.S.A. 2A:34-65] and:
>
> > a. the court of the other state determines it no longer has exclusive, continuing jurisdiction under [N.J.S.A. 2A:34-66] or that a court of this State would be a more convenient forum under [N.J.S.A. 2A:34-71]; or
> >
> > b. a court of this State or a court of the other state determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other state.
>
> [N.J.S.A. 2A:34-67.]

As we have noted, at the time the trial court awarded custody of the child to Chesare, there was no evidence that Georgia had ever determined that it no longer had exclusive, continuing jurisdiction over

the child, or that New Jersey would provide a more convenient forum. And the record further reveals that Chesare has remained a resident of Georgia throughout all these proceedings. Thus, none of the circumstances set forth in subsections (a) and (b) applied here.

Lastly, we conclude there was no significance to the order entered by the Georgia court on August 9, 2006, after the trial judge here entered the order awarding custody of the child to Chesare. The statutes quoted above require that any relinquishment of jurisdiction by the state with exclusive jurisdiction must occur before the other state assumes jurisdiction. Were it otherwise, there would be a danger, upon a party's request for after-the-fact approval, that the other state could deem it convenient or expedient to approve of its relinquishment of jurisdiction. We do not mean to suggest that this is what occurred here. What we must insist upon, however, is that the requirements of the UCCJEA be precisely met before the exercise of jurisdiction by our courts over foreign custody orders to avoid adding confusion to what, in many circumstances, often is a difficult or convoluted set of circumstances. A later decision relinquishing jurisdiction cannot support another state's unauthorized assumption of jurisdiction.

For these reasons, we reverse the order of June 22, 2007, which denied Deborah's motion to vacate, we vacate the order of March 17, 2005, which granted Chesare custody of the child, and we mandate the dismissal of Chesare's petition for custody of the child.

I hereby certify that the foregoing is a true copy of the original on file in my office

/s/ John M. Crocker

CLERK OF THE
APPELLATE DIVISION

O.C.G.A. § 9-11-60. Relief from judgments

(a) *Collateral attack.* A judgment void on its face may be attacked in any court by any person. In all other instances, judgments shall be subject to attack only by a direct proceeding brought for that purpose in one of the methods prescribed in this Code section.

(b) *Methods of direct attack.* A judgment may be attacked by motion for a new trial or motion to set aside. Judgments may be attacked by motion only in the court of rendition.

(c) *Motion for new trial.* A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings.

(d) *Motion to set aside.* A motion to set aside may be brought to set aside a judgment based upon:

(1) Lack of jurisdiction over the person or the subject matter;

(2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or

(3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or

other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

IN THE SUPERIOR COURT OF COBB COUNTY
STATE OF GEORGIA

GEORGIA DEPARTMENT OF HUMAN RESOURCES) et rel. TIFFANY HORTON	) Civil Action No. 02-1-2138-33
	) DEBORAH FAY HINTON
PETITIONER(S) vs CHESARE S HORTON RESPONDENT	) CONSENT ORDER NON AFDC

The parties in the above styled action wish to settle this matter by the Court's entry of a consent order.

THE COURT MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

A. The Respondent is the natural and biological parent of the minor child(ren) named in Petitioner's complaint and listed below:

CHILD(REN)'S NAME	CHILD(REN)'S D.O.B.
TIFFANY HORTON	06/06/2000

B. The respondent parent earns approximately $2962.00 per month based on TAX RECORDS and the custodial parent, earns approximately $2817.00 based on FINANCIAL AFFIDAVIT.

C. Under the guidelines of O.C.G.A § 19-6-15, Respondent should pay between 17% and 23% of his or her gross income, or between $504.00 and $681.00 per month for the support of the 1 child(ren) in this case. The following special circumstances require that the child support amount deviate from the guidelines:

__1. Ages of children
__2. A child's extraordinary medical costs or needs in addition to accident and sickness insurance, provided that all such costs or needs shall be considered if no insurance is available
__3. Educational costs
__4. Day-care costs
__5. Shared physical custody arrangements, including extended visitation
xx6. A party's other support obligations to another household
__7. Income that should be imputed to a party because of suppression of income
__8. In-kind income of the self-employed, such as reimbursed meals or a company car
__9. Other support a party is providing or will be providing, such as payment of a mortgage
__10. A party's own extraordinary needs, such as medical expenses
__11. Extreme economic circumstances but not limited to:
(A) Unusually high debt structure, or
(B) Unusually high income of either party or both parties, which shall be construed as individual gross income of over $75,000.00 per annum
__12. Historical spending in the family for children which varies significantly from the percentage table

__13. Consideration of the economic cost-of-living factor of the community of each party, as determined by the trier of fact
__14. In-kind contribution of either parent
__15. The income of the custodial parent
__16. The cost of accident and sickness insurance coverage for dependent children included in the order
__17. Extraordinary travel expenses to exercise visitation or shared physical custody
__18. Any other factor which the trier of fact deems to be required b y the ends of justice.

1. IT IS THEREFORE HEREBY ORDERED that Respondent shall pay to Child Support Enforcement for the support of said child(ren) the following sum; $504.00 per month. Said support shall begin FEBRUARY 15, 2002, and shall continue until the child maries, dies, becomes emancipated, becomes self supporting or reaches the age of 18 years, but if any child is in high school beyond that child's 18th birthday, then until that child completes high school or reaches the age of 20 years, whichever event shall first occur, or until Child Support Services of Georgia/Georgia notifics Respondent in writing that payments of current support for the child(ren) are to be paid directly to the child(ren)'s custodian. Said payments are to be made by cashier's check, certified check or money order payable to **Child Support Enforcement, Family Support Registry, PO Box 105730, Atlanta, Georgia 30348-5730.**

2. IT IS FURTHER ORDERED that Respondent is in arrears of $0.00 based upon a previous order and shall pay $0.00 per month to the Child Support Enforcement, on behalf of (his) (her) minor child(ren) beginning FEBRUARY 15, 2002, until (his) (her) entire debt is paid in full. Default in any one payment of current support on the above-mentioned debt shall automatically result in the entire balance

coming due and payable. Additionally, beginning 7/1/96, interest will accrue at the rate of 12% per annum on all support payments that are 30 days or more past due.

3. IT IS FURTHER ODERED that Respondent shall maintain accident and sickness insurance for the minor child(ren) whenever and so long as the same is maintained by Respondent, or is available through the Respondent's employer or otherwise. Respondent is further required to immediately notify Child Support Services of Georgia/Cobb County when and if group health insurance becomes available. Respondent shall send a copy of the insurance policy and or insurance card to MAXIMUS Child Support Services within 10 days of this date, or within 10 days of Respondent's obtaining said insurance.

4. IT IF FURTHER ORDERED that income deduction, in accordance with O.C.G.A. 19-6-29 et seq. shall be used to enforce the current child support, child support arrearage an accident and sickness insurance provisions of this order in accordance with the provisions of O.C.G.A. 19-6-29 et seq. An Income Deduction Order shall be execute din conjunction with this Order, and its terms shall be incorporated by reference herein, and made a part hereof.

5. IT IF FURTHER ORDERED that Respondent shall pay Court Costs in the amount of $0.00 on or before FEBRUARY 15, 2002. Payment of Court Costs shall be in the form of a money order, certified check or cashier's check, made payable to the Clerk of the Superior Court, Cobb County, and mailed to the Clerk of the Superior court.

6. It is Further Ordered That Respondent shall pay service fees in the amount of $0.00 on or before 0.00. Payment of service fees shall be in the form of a money order, certified check or cashier's check marked "service fees", made

payable to **MAXIMUS Child Support Services, 2812 Spring Rd., Suite 150, Atlanta, GA 30339.**

7. IT IF FURTHER ORDERED that Respondent shall pay the cost of paternity testing totaling $0.00 on or before , Payment of said cost shall be in the form of a money order, certified check or cashier's check marked "service fees", made payable to **MAXIMUS Child Support Services, 2812 Spring Rd., Suite 150, Atlanta, GA 30339.**

8. IT IF FURTHER ORDERED that whenever, in violation of the terms of this order there shall have been a failure to make the support payments due hereunder so that the amount unpaid is equal to or greater than the amount payable for one month, the payments required to be made may be collected by the process of continuing garnishment for support.

9. DEBORAH FAY HINTON, as the custodian of the minor child(ren), shall have the right of enforcement of this order for current periodic child support if at any future time the custodian no longer receives public assistance on behalf of the child(ren), and/or has notified MAXIMUS Child Support Services/Cobb County to terminate the Petitioner's assignment to collect under and enforce this Order.

10. IT IF FURTHER ORDERED that Respondent, to receive credit for any payments for child support, or any other such payments as ordered herein, must be made in the manner ordered herein without deviation, and any such payments made outside said manner by Respondent will not be credited to him for the purposes of this Order.

Consented:

/s/ Chesare S. Horton
2.5.2002
CHESARE S HORTON Date
Respondent

/s/ Candy Hardie
CANDACE HARDIE
Child Support Specialist

THURBERT E. BAKER, ESQ. BAR #033887
Attorney General
WILLIAM C. JOY, ESQ. BAR #405500
Senior Assistant Attorney General
KATHERINE R. SMITH, ESQ. BAR #661140
Assistant Attorney General

/s/ Teresa Lazzaroni
TERESA E. LAZZARONI, ESQ. Bar #438614
Special Assistant Attorney General

SO ORDERED, this the 27th day of March, 2002.

/s/ G. Conley Ingram
Sr. Judge, Cobb County Superior Court
Cobb Judicial Circuit

Case Number: 300011637

G. CONLEY INGRAM, SENIOR JUDGE
SUPERIOR COURTS OF GEORGIA
PRESIDING IN COBB JUDICIAL CIRCUIT

GEORGIA, COBB COUNTY
I HEREBY CERTIFY THE WITHIN AND FOREGOING
TO BE A TRUE, CORRECT AND COMPLETE COPY OF
THE ORIGINAL THAT APPEARS OF RECORD
CASE NO. 02-1-2138, IN THIS OFFICE.
THIS 31 DAY OF MAY 2006

/s/ Jay C. Stephenson
DEPUTY CLERK, COBB SUPERIOR
COURT, COBB COUNTY, GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

DEBORAH HINTON-LYNCH Appellant	*	
v.	*	
CHESARE HORTON, Appellee.	*	APPEAL NO. A09A1934

OPENING BRIEF OF APPELLANT

Deborah Hinton-Lynch
8541 Pineway Dr.
Laurel, MD 20723
(443) 844-6934
Pro Se

APPELLANT'S OPENING BRIEF

PRELIMINARY STATEMENT

Appellant, Deborah Hinton-Lynch appeals the decision of the Cobb County Superior Court (hereafter "trial court") in modifying a domesticated New Jersey Appellate Court order which vacated their lower Courts' ruling awarding child custody to appellee. Appellant avers that four harmful errors occurred below warranting reversal of the entry of the final order transferring custody from defendant to plaintiff.

First, the trial court erred in entering a second and different order, involving the same parties, in the same suit where no motion to set aside or to vacate the domesticated final judgment was initiated, thereby, rendering the second order void ab initio.

Second, the trial court erred by allowing a petition for a change of custody to be brought as a counterclaim. This honorable Court has repeatedly held that an action initiating a change of custody must be brought as a separate action.

Third, the trial court erred by awarding custody of minor child to plaintiff after plaintiff's testimony established grounds for the criminal offense of interstate interference of child custody. The trial court egregiously abused its discretion in rewarding plaintiff legal benefits from an illegal action.

Fourth, the trial court erred in its finding of facts and conclusion of law, that defendant had abandoned minor child as plaintiff presented no evidence in support of such finding.

The decision of the trial court is in direct conflict with prior decisions of this Court and

Georgia's Public Policy as herein addressed. Accordingly, appellant moves this honorable Court to hold that the Cobb County trial court lacked jurisdiction to modify a domesticated final judgment not set aside; the trial court erred in allowing a counterclaim for custody, and that the trial court abused its discretion in finding a material change of circumstance warranting modification of custody from defendant to plaintiff. Lastly, appellant implores this Court to vacate or reverse in the alternative the trial courts' orders in this matter.

PART I

STATEMENT OF PROCEEDING BELOW

On September 24, 2008, Defendant-Appellant, Deborah Hinton, (hereafter "Hinton-Lynch") filed a Petition for Domestication and Enforcement of Foreign Judgment (R-76) in Cobb County Superior Court. The New Jersey Appellate Court vacated their lower court's order granting Plaintiff-Appellee, Chesare Horton (hereafter "Horton") sole custody of the parties minor child, Summer-Raye Horton, due to lack of subject matter jurisdiction on March 17, 2005. (R-77-85). Upon receiving notice of the New Jersey Appellate decision, Horton counterclaimed for temporary emergency custody and permanent modification of child custody on September 25, 2008. (R-19-21) A temporary emergency custody hearing was held on September 25, 2008 where Judge Michael Stoddard granted said petition. (R-22) A hearing to determine maintaining temporary custody was set for October 20, 2008 with Judge Mary E. Staley. (R-23) Counsel for plaintiff, Anthony Hallmark, requested a continuance then requested to forego a temporary hearing and proceed to a final. Hinton-Lynch did not object and a final hearing on December 8, 2008 was scheduled. (R-52)

The final hearing proceeded to trial on December 11, 2008 where both parties were present.

Horton was represented by counsel and Hinton-Lynch appeared pro-se as she could not afford an attorney. Horton testified on his own behalf, and Hinton-Lynch cross-examined Horton (T-28), and then testified on her own behalf. (T-61) The trial court concluded that a written order would be sent in one to two weeks. (T-78) On December 19, 2008, plaintiff's petition for modification of child custody and child support was granted. (R- 60-72) Defendant filed a timely notice of appeal on December 31, 2008. (R-3)

STATEMENT OF FACTS

The Plaintiff and Defendant were never married and their only child together, Tiffany Summer-Raye Horton, was born on June 6, 2000 in Belleville, New Jersey. Plaintiff moved to Georgia in November 1999; defendant and child subsequently relocated in November 2000 and all resided together. Plaintiff ended relationship in June 2001. Defendant filed for child support in December 2001. Child support and custody was incorporated in a consent order on March 27, 2002 in the Superior Court of Cobb County, Georgia decreeing defendant sole custodian. (D-101 thru 104) Plaintiff petitioned for legitimization and visitation and **supervised** visitation was granted on April 25, 2002. (D-105 thru 107) (T-33, L 1-6)

In May 2002, defendant and child relocated with plaintiff's consent, to Jersey City, NJ where she and the parties' daughter resided. On or approximately around August 20, 2004, Dr. Crystal Pearson, mother of plaintiff's eldest child, Tykeiah, contacted defendant via phone, and alleged that plaintiff had allowed Tykeiah (then 12 yrs. old) and minor child at issue (then 4 ½ yrs. old) to go unsupervised to a pool within his apartment complex where minor child slipped into pool. Defendant filed for supervised visitation with the Essex County

Superior Court, in New Jersey in October of 2004. Visitation hearing was held on January 4, 2005 before Judge Patricia M. Talbert. Defendant missed hearing assuming it was on January 5, 2005. (D-111) Trial court dismissed hearing for lack of prosecution but ironically issued bench warrant though defendant initiated action. The trial court reissued another summons to appear on issue of visitation scheduled for January 31, 2005. Defendant appeared and alerted trial court that plaintiff had taken minor child the previous night from maternal grandmothers' home in North Carolina back to Georgia. (D-112) Trial court concluded, without an evidentiary hearing that defendant had relinquished custody of minor child (D-117, L 2-15) and that defendant did not have legal custody either and that someone would have to make an application for custody. (D-126, L 13-22) On February 24, 2005, defendant was finally allowed to speak with minor child since toddler's abduction on January 30, 2005. Toddler upon hearing her mothers' voice, wailed repeatedly "Mommy, Mommy"! Defendant could not bear the pain of not being able to soothe her child and therefore reacted emotionally and irrationally. Defendant regretfully admits immediately driving to Georgia and in route fabricating an order remanding custody back to her and forging Judge Talbert's signature.

On February 25, 2005, defendant contacted the Georgia police directly and presented fabricated order to police to escort defendant to plaintiffs' home in Powder Springs, GA. Plaintiff noticed immediately that the order was not a standard New Jersey order and alerted police. Police refused to take possession of the minor child and allowed defendant to leave pending confirmation. A bench warrant for forgery and for attempted interference with child custody was issued. Defendant turned herself in April of 2005. Trial commenced on November 2, 2006. Defendant who had never been in trouble with the law prior to February 25, 2005,

was placed in the first offender's program for forgery with the charge of interference with child custody being dismissed.

On or around April 27, 2005, plaintiff alerted defendant that he was granted residential and legal custody and that defendant had to start paying child support. Defendant promptly contacted the New Jersey Superior court where she was told that a *support* hearing had commenced on March 17, 2005 granting plaintiff residential and legal custody. (P-79)

Defendant petitioned unsuccessfully, several times in Georgia to have the New Jersey order vacated. One such order was for a writ of Habeas Corpus, which was denied. (P-81 thru 84) On June 22, 2007, defendant petitioned the Superior Court of New Jersey to vacate its order granting plaintiff custody based on lack of subject matter jurisdiction pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act. (hereafter "UCCJEA") The New Jersey trial court denied the petition and defendant appealed pro-se to the New Jersey Appellate Court. On September 23, 2008, the New Jersey Appellate division vacated the lower court's order granting custody to plaintiff. (R-77-85)

PART II

ENUMERATION OF ERRORS

I. The trial court erred in entering a second and different order involving the same parties, in the same suit, where the domesticated final judgment was not set aside or vacated, thereby rendering the second order void ab initio.

II. The trial court erred in allowing a petition for modification of child custody to be brought as a counterclaim.

III. The trial court erred by granting plaintiff's petition in violation of Georgia's Public Policy and in contravention of the "Unclean Hands" doctrine.

a. The trial court abused its discretion in granting plaintiff's petition after plaintiff's testimony established probable cause of criminal misconduct that relates directly to the subject matter concerning the relief sought.

IV. The trial court erred in finding a material change of circumstances warranting a change of custody.

a. The trial court abused its discretion in finding defendant abandoned minor child.

b. The trial court abused its discretion in applying the "Unclean Hands" doctrine against defendant as basis for a change of custody.

JURISDICTIONAL STATEMENT

Pursuant to O.C.G.A. § 5-6-34 (a) (11), this Court and the Georgia Supreme Court, has jurisdiction of this direct appeal of award of child custody.

PART III
STANDARD OF REVIEW

This Court reviews the change of child custody under the "any ***reasonable*** evidence" test. ***See Scott v. Scott***, 227 Ga. App. 346, 348 (1) (489 S.E.2d 117) (1997). A decision determining whether a material change of condition has occurred, affecting the welfare of the child is reviewed for abuse of discretion. See ***Hardin v. Hardin***, 274 Ga. App.

543, 618 S.E.2d 169 (2005).

ARGUMENT AND CITATION OF AUTHORITY

I. THE TRIAL COURT ERRED IN ENTERING A SECOND AND DIFFERENT ORDER, INVOLVING THE SAME PARTIES, IN THE SAME SUIT WHERE THE DOMESTICATED FINAL JUDGMENT WAS NOT SET ASIDE NOR VACATED, THEREBY RENDERING THE SECOND ORDER VOID AB INITIO.

Pursuant to O.C.G.A. § 9-12-132, the Uniform Enforcement of Foreign Judgments Law (the "Uniform Act"), provides..."[T]he clerk shall treat the foreign judgment in the same manner as a judgment of the court in which the foreign judgment is filed. A filed foreign judgment has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, staying, enforcing, or satisfying as a judgment of the court in which it is filed and may be enforced or satisfied in like manner."

In ***Arrowhead Alternator, Inc. et. al. v. CIT Communications Finance Corp.***, 268 Ga. App. 464, 602 S.E.2d 231, (2004), CIT obtained a default judgment against Arrowhead in a New Jersey court. CIT then filed a petition to domesticate the New Jersey judgment in the Superior Court of Clayton County pursuant to the Uniform Act. O.C.G.A. § 9-12-130. Arrowhead moved to set aside the New Jersey judgment and their motion was denied. Arrowhead did not appeal the denial of their motion to set aside but appealed the second judgment rendered by Georgia ordering payment of the exact amount to CIT. This Court dismissed the appeal citing that the second order was void. Appellant avers similarities between ***Arrowhead Alternator, Inc. et. al.***, supra, and this instant

case.

Hinton-Lynch obtained a decision from the New Jersey Appellate court on September 23, 2008 order expressly stating that their lower court lacked subject matter jurisdiction in modifying Georgia's consent order which declared Hinton-Lynch sole custodian and that Horton did not have custody. (R-84-89) On September 24, 2008, appellant filed a petition for domestication and enforcement of the New Jersey judgment in the Superior Court of Cobb County pursuant to the Uniform Act. See O.C.G.A. § 9-12-130 thru O.C.G.A. § 9-12-138. The petition was attached with an authenticated copy of the New Jersey judgment and an affidavit was filed as required by O.C.G.A. § 9-12-132 and O.C.G.A. § 9-12-133. (R-86) ***See Hammette v. Eickemeyer***, 203 Ga. App. 243, 416 S.E.2d 824, (1992). Additionally, New Jersey has also adopted their own version of the Uniform Enforcement of Foreign Judgment Act codified under N.J.S.A. § 2A:49A-25 et seq.

"The proper method for attacking a foreign judgment filed in Georgia under the Uniform Act is a motion to set aside under O.C.G.A. § 9-11-60 (d). ***Arnold v. Brundidge Banking Co.***, 209 Ga. App. 278, 433 S.E.2d 388, (1993). This Court has held, "[W]hen a final judgment has once been entered, no second or different judgment may be rendered between the same parties and in the same suit, *until* the first shall have been vacated and set aside or reversed on appeal or error. Where a second judgment is entered by a court after the first judgment has become final, the second judgment is *void*." ***Arrowhead Alternator, Inc. et. al. v. CIT Communications Finance Corp.***, 268 Ga. App. 464, 602 S.E.2d 231 (2004) See O.C.G.A. § 17-9-4 Horton did not appeal the September 23, 2008 New Jersey Appellate Court decision in the foreign state nor did Horton petition the Cobb County trial court to set aside or to vacate the domesticated foreign judgment. Instead, Horton chose to relitigate a

second action in the same suit between the same parties by petition to modify custody in New Jersey then Georgia courts. (R. 4-12) (T-33, L 23-25; T-42, L 12-25).

It follows that the December 11, 2008 judgment was void ab initio and is a nullity because the New Jersey judgment, as properly domesticated in Georgia, was not vacated nor set aside. ***Abushmais et al., v. Erby***, 282 Ga. 619, 652 S.E.2d 549 (2007).

II. THE TRIAL COURT ERRED BY ALLOWING A PETITION FOR MODIFICATION OF CHILD CUSTODY TO BE BROUGHT AS A COUNTERCLAIM.

O.C.G.A. § 19-9-23 (a)(c)(1)(2) provides..."[A]fter a court has determined who is to be the legal custodian of a child, *any* complaint seeking to obtain a change of *legal custody* shall be brought as a *separate action* in the county of residence of the legal custodian of the child...(c) No complaint specified in subsection (a) or (b) of this Code section shall be made: (1) As a *counterclaim* or in any other manner..."

In ***Bailey v. Bailey***, 283 Ga. App. 361, 641 S.E.2d 580, (2007), this Court opined, "We have held that the language of O.C.G.A. § 19-9-23 is "clear and unequivocal and is "mandatory". ***See Hammontree v. Hammontree***, 186 Ga. App. 819, 821, 368 S.E.2d 576 (1988), ***Ganny v. Ganny***, 238 Ga. App. 123, 125(2), 518 S.E.2d 148 (1999) "Our courts have repeatedly held that this statute precludes a counterclaim seeking a change in custody". ***See Wilson v. Baldwin***, 239 Ga. App. 327, 328, 519 S.E.2d 251 (1999), ***Terry v. Garibaldi***, 274 Ga. App. 405, 408 (1) 618 S.E.2d 6 (2005). "The statute is clear: any complaint seeking to obtain a change of custody of a child shall be brought as a separate

action. We cannot ignore the clear language of the statute, even where it appears... to defy logic." Terry, supra, 274 Ga. App. at 408.

In this instant case, on September 24, 2008 in the Superior Court of Cobb County, Hinton-Lynch filed a petition for Domestication and Enforcement of the New Jersey Appellate order vacating their lower court's order granting Horton sole custody.[1] (R-76, R-77-85) Horton, upon notice that he had been divested of custody, (R-6 Para. 15) refused to relinquish the minor child. On September 25, 2008, Horton retained counsel to file a Petition for Emergency Custody and Petition for Modification of Custody as a *counterclaim* alleging that Hinton-Lynch was going to abscond with the minor child.[2] (R- 23) Hinton-Lynch preserved her issues within her verified Answer and Affirmative Defenses to dismiss Horton's petition as a counterclaim. (R- 24-27 Para 28, Para 29 (a)) The trial court committed reversible error by granting Horton's petition for a change in custody brought under a counterclaim.

III. THE TRIAL COURT ERRED BY GRANTING PLAINTIFF'S PETITION IN VIOLATION OF GEORGIA'S PUBLIC POLICY AND IN CONTRAVENTION OF THE "UNCLEAN HANDS" DOCTRINE.

Under Georgia law, a plaintiff's unclean hands generally prevent the court from even considering the merits of the plaintiff's claims. The fact that the defendant may be liable for all claims is simply irrelevant. ***See West v. West***, 825 F. Supp. 1033

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[1] Petition for Domestication of Foreign Judgment for enforcement with attached New Jersey Appellate Court order was filed-stamped in Cobb County Superior Court on September 24, 2008.

[2] Motion for Emergency Temporary Custody order with attached rule nisi specifying such as a counterclaim was filed-stamped on September 25, 2008.

(N.D. GA. 1992).

In ***Hollifield v. Monte Vista Biblical Gardens, Inc. et al.***, 215 Ga. App. 124, 553 S.E.2d 662 (2001) an action for ejectment and trespass against Hollifield was brought by the landowner's for encroachment. The trial judge granted a writ of ejectment against Hollifield. Hollifield appealed and this Court affirmed the trial court's decision. "In knowing there was only a possibility or chance that land owner would sell to him...he proceeded to build on land that **he knew that he did not own**. He **admitted** that he erected a brick and iron-work fence...**knowing that it encroached on plaintiffs' lands;** he also **admitted** paving over a path **without permission of the owner...Hollifield has admitted the grounds for the issuance of a writ of ejectment** ..." "When a party comes into court with unclean hands, equity will not grant relief to such party". ***See Head v. Walker***, 243 Ga. 108, 110, 252 S.E.2d 440 (1979); ***Fuller v. Fuller***, 211 Ga. 201, 202, 84 S.E.2d 665 (1954).

A. The trial court abused its discretion in granting plaintiff's petition after plaintiff's testimony established probable cause of criminal misconduct that relates directly to the subject matter concerning the relief sought.

In Hollifield, supra, Hollifield admitted to; 1) building on other's land *without permission*, 2) building on land that *he did not own*, and that 3) he *acted with knowledge* or *reckless disregard of the truth* while building on other's land. Under cross-examination, Horton voluntarily admitting under oath to, 1) *taking the child without court authority* (T-31, L 18-20; T-38 L 1-9); 2) knowingly taking the child *from the individual who had lawful custody* on

January 30, 2005 (T-31, L 21-25; T-42, L 14-25 thru T-43, L 1-6; T-46, L 7-20; T-50 L 21-25; T-51, L 1-3); and removing the child from the state of North Carolina *bringing her into the state of Georgia in absence of an emergency.* (T-34, L 13-16; T-38, L 18-21; T-39, L 4-10) Hinton-Lynch preserved the defense to dismiss Horton's petition (R-25 Para. 26) (T-6, L 7-10) pursuant to O.C.G.A. § 23-1-10 for establishing grounds of the offense of interstate interference of child custody pursuant to O.C.G.A. § 16-5-45-(c)(1). (T-7, L 1-5) This statute provides "A person commits the offense of interstate interference with custody when without lawful authority to do so the person knowingly or recklessly takes or entices any minor or committed person away from the individual who has lawful custody of such minor or committed person and in so doing brings such minor or committed person into this state or removes such minor or committed person from this state".

Appellant contends trial court erred in finding that Horton did not have unclean hands by stating he did not "snatch the child" simply because he was allegedly called by the grandparents. (R-64, Para. 22) Lawful custody of minor child was not with the maternal grandparents by any court order. (T-41, L 1-17; T-43, L 3-11) In ***Floyd v. State,*** 132 Ga. App. 11, 207 S.E.2d 262 (1974), this Court opined that the conviction of interference of child custody was affirmed in that case because..."[f]act that one who had lawful custody had asked another to *temporarily* supervise child would not affect legal status of child's lawful custody". Horton's assertion that the status quo should continue because the minor child has been with him for over 3 years (T-5, L 15-17) is the crux and the thorn of this convoluted case. Hinton-Lynch contends that because of *how and when* Horton took illegal physical possession of the child, he set into motion a chain of events that one now would never know the original legal outcome to since Horton did not initially proceed in a legal manner. The trial court egregiously abused its discretion in

allowing plaintiff benefits of legal possession of a child to whom he took possession of illegally.

IV. THE TRIAL COURT ERRED IN FINDING MATERIAL CHANGES OF CIRCUMSTANCE WARRANTING A CHANGE OF CUSTODY.

O.C.G.A. § 19-9-1(b) provides... that the trial court must find a material change in circumstances that has affected the child affirmatively before considering whether modification of custody is in the children's best interests. ***Bodne v. Bodne***, 277 Ga. 445, 588 S.E.2d 728 (2003) ***See Scott v. Scott***, 276 Ga. 372, 373, 578 S.E.2d 876 (2003). ***Bodne*** is distinguishable from this case for these reasons; 1) Ms. Bodne had shared *equal custody, care and involvement with the children per the party's written agreement*, and 2) at trial, numerous witnesses...testified that the children would suffer irreparable harm in being denied regular contact with their mother if Dr. Bodne was to relocate to California. Thus, the court determined that there had been; 1) new and material change in condition and; 2) that it affected the child. ***See Frank v. Lake***, 266 Ga. App. 60, 599 S.E.2d 223 (2004) Id. at 63-64 (2) (reasonable evidence of medical neglect by father supported custody modification).

In this instant case, *sole* custody of the minor child was granted to Hinton-Lynch. (D-101 thru 104) Horton had neither equal custodial rights nor equal involvement with the minor child since birth. Horton did not petition to legitimize his daughter until approximately two years after her birth. (T-32, L 21-25)

Additionally, no witnesses, expert or otherwise testified on behalf of the plaintiff that the minor child had been affected while she was in the

care of Hinton-Lynch, nor that she would be affected if returned to Hinton-Lynch's care, nor since being under Horton's care the child's happiness, well-being and lifestyle had been promoted. See ***Jones v. Kimes***, 287 Ga. App. 526, 652 S.E.2d 171 (2007).

A. The trial court abused its discretion in finding defendant had abandoned minor child as a material change of circumstance warranting a change of custody.

Georgia has several definitions for "abandonment". See O.C.G.A. § 19-10-1, O.C.G.A. § 15-11-94, O.C.G.A. § 15-11-2(8)(C). Appellant asserts that the trial court erred in its lack of delineation of a statute in support of "abandonment" under its Conclusions of Law. (R-63 Para.17) Additionally, under the requirements deeming abandonment as set forth in the above-mentioned statutes, allegations nor evidence was introduced to support that appellant met any such requirement. In this instant case, Hinton-Lynch contends that the trial erroneously determined in its Finding of Facts, that Hinton-Lynch testified to abandoning the minor child and that the duration was for several months. (R-62 Para. 13) Hinton-Lynch specifically testified that the relinquishment was temporary and attempted to admit into evidence a certified transcript of a North Carolina hearing but was denied.[3] (T-65, L 22-24; T-68, L 1-17) Appellant had given maternal grandmother child support via a debit card to support minor child; traveled each month from New Jersey to North Carolina to visit and called child almost everyday. (R-32 Para. 26-29)

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[3] Certified North Carolina transcript of hearing where appellant cross-examined the maternal grandmother who testified that the arrangement for minor child was indeed temporary.

Appellant avers that the trial court based its finding of abandonment **solely** on Horton's testimony of alleged findings of abandonment from a January 31, 2005 visitation proceeding from a court with no competent jurisdiction. (T-12 L 23-25 thru T-13 L 1-8) Notably, Horton did not allege abandonment even from this initial proceeding. On September 23, 2008, New Jersey's Appellate Court vacated the lower court's subsequent decision modifying custody on March 17, 2005 due to lack of subject matter jurisdiction pursuant to the UCCJEA. (R-77-85) It follows that any orders entered in New Jersey prior to the New Jersey Appellate Courts' order holding its state lacks jurisdiction, is a nullity and holds no equitable value.

In ***Askew v. Askew***, 212 Ga. 46, 90 S.E.2d 409 (1955), the Georgia Supreme court affirmed the trial courts determination that the plaintiff had surrendered custody of her children *by written contract*. The Georgia Supreme Court held..."[a]nd a writing signed by the plaintiff and the defendant appears in the record by which the plaintiff agreed to surrender the custody of the children to the defendant. This surrender by the mother of the custody of the children is such a change in condition as will authorize a court to consider again the question of custody..." The Georgia Supreme court reasoned that only *when* there was a signing of a contract releasing custody and control of a child was there *then* a material change of circumstance warranting the court to consider the question of custody. O.C.G.A. § 19-7-1 (b) (1), (D-116, L 20-25 thru D-117, L 1-9) See ***Wilson v. Wilson***, 241 Ga. 305, 245 S.E.2d 279 (1978).

Appellant avers that the trial court's findings and conclusions of emergency abandonment is unequivocally contrary, due to the lack of evidence presented. (i) Horton did not allege abandonment (R 4-12) but testified that he took the child simply because the step-grandparent allegedly called him

inquiring why he had not heard from Horton, (T-11, L 11-23) (ii) that he was upset that he had not seen his child for three months, (T-11, L 13-14) (iii) Horton testified that the appellant's step-father called him because he wanted Horton to know the minor child's whereabouts *not* because appellant had abandoned the minor child, (T-60, L 1-15) and (iv) Horton introduced no evidence of any written agreement signed by Hinton-Lynch releasing custody or a court order granting temporary or permanent custody to any other party. (T-42, L 18-25 thru T-43, L 1-6) Additionally, the duration of three months that the child was physically with the maternal grandmother was at best minimal. (R-31 Para. 15) (T-11, L 13-14) Horton's absconding of the child from the state of North Carolina was not predicated upon any "emergent" condition to warrant removal without permission or acknowledgement of appellant as legal custodian. See ***Webb v. Webb*** 245 Ga. 650, 266 S.E.2d 463 (1980).

The trial court abused its discretion in finding emergency abandonment as a material change of circumstance warranting a change of custody.

B. The trial court abused its discretion in applying the "Unclean Hands" doctrine to the defendant in this case as basis for a material change of circumstance warranting a change of custody.

O.C.G.A. § 23-1-10, the "Unclean Hands" Doctrine provides... "That one who seeks equity must do equity". In ***In the Interest of G.W.R.*, A04A1448 (Ga. 2004)** O.C.G.A. § 15-1-94(b)(4)(B)(iii)-(v)..."the court must consider, among other things, [c]onviction of the parent of a felony and imprisonment therefore which has a **demonstrable negative effect** on the quality of

the parent-child relationship..." Appellant admitted openly at trial in 2005, that she had attempted to get her daughter back by forgery *after* Horton illegally absconded with the child (T-17, L 1-4) but avers that she was charged but was **not** convicted of any crime. Horton produced no evidence that appellant had been convicted nor did Horton produce any evidence (T-17, L 1-7) to support a negative affect on the child-parent relationship due to appellant's admission of forgery. Horton was arrested and then charged of abandonment himself. (D-133 thru 136) (T-54 thru 55) It was an error for the trial court to attribute "unclean hands" as grounds to transfer custody to appellee after reaching the merits from each party in this instant case.

CONCLUSION

The trial court abused its discretion in rendering a second order from a domesticated foreign judgment not set aside; by finding a change in circumstance warranting a change in custody in absence of any evidence to support its findings; and by awarding custody to the plaintiff in direct violation of Georgia's Public Policy.

For all the foregoing reasons, appellant implores this Court to vacate or reverse the trial court's order awarding custody to plaintiff and to award appellant fees for defending this proceeding, and such other and further relief to which she may be justly entitled.

This the 29th day of , June , 2009
Respectfully submitted.

/s/ Deborah Hinton-Lynch
Deborah Hinton-Lynch.
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CERTIFICATE OF MAILING

I hereby certify, that three true and correct copies of the **Appellant's Opening Brief and Index** was mailed via UPS overnight (to Georgia Appellate Division), one copy via certified postage prepaid, to remaining parties stated below:

Hallmark Bowman & Hallmark
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Court of Appeals State of Georgia
Clerk of Court
47 Trinity Avenue, Suite 501
Atlanta, GA 30334
(404) 656-3450

This the 29th day of , June , 2009

/s/ Deborah Hinton-Lynch
Deborah Hinton-Lynch,
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443-844-6934

IN THE COURT OF APPEALS
STATE OF GEORGIA

DEBORAH HINTON-LYNCH Appellant	*	
v.	*	
CHESARE HORTON, Appellee.	*	APPEAL NO. A09A1934

REPLY BRIEF OF APPELLANT

Deborah Hinton-Lynch
8541 Pineway Dr.
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Pro Se

REPLY BRIEF OF APPELLANT

COMES NOW Deborah Hinton-Lynch, appellant in the above-styled matter, Pro-Se, and files her Reply Brief as follows:

REPLY TO APPELLEE'S STATEMENT OF FACTS

Appellee states on January 31, 2005, the Superior Court of New Jersey issued an order relinquishing Appellant of Custody and sending the child home with the Father. Appellee deliberately misleads this Court. (See Appellee's Brief, Pg. 5) (T-36, L 5-25; T-37, L 6-12) Appellee had absconded with minor child the NIGHT BEFORE any court of competent or non-competent jurisdiction, or any agency with authority granted him permission to do so. (T-38, ll 1-15)

Furthermore, appellee incorrectly denotes the date of September 10, 2008 as the date the New Jersey Appellate Court vacated their lower courts' order granting Appellee custody of minor child. (See Appellee's Brief, Pg. 8) The New Jersey Appellate Court's decision was finalized on September 23, 2008. (R-77-85)

ARGUMENT AND CITATION OF AUTHORITIES

I. Appellee argues that because the New Jersey Appellate Division vacated the custody order of the New Jersey Court trial for lack of subject matter jurisdiction, res judicata could not apply because merits were not reached. Therefore, appellee contends he was not barred from pursuing a modification of custody case in the jurisdiction of Cobb County Georgia. This logic is misplaced.

The New Jersey Appellate's task via appeal was to determine if their lower court lacked subject

matter jurisdiction to modify Georgia's custody order that had been in affect since March 27, 2002. (Def. Ex. B, Pg. 103, Def. Ex. C, Pg. 105-107) It decided in the affirmative that it did not. **(R-77-85)** Appellant domesticated the foreign judgment for the purposes of Full Faith and Credit recognition of a valid order and for the purposes of enforcement under the Uniform Enforcement of Foreign Judgment Act. **O.C.G.A. § 9-12-130, et seq**. "Under the full faith and credit clause of the United States Constitution, a judgment of a foreign court will be enforced by courts of this state. That judgment may be collaterally attacked when the foreign court lacked jurisdiction of the person or subject matter." ***Gordon v. Gordon***, 237 Ga. 171(1), 227 S.E.2d 53 (1976) **(R-76)** Additionally, as required for application of the Uniform Act, New Jersey has also adopted their version of the Uniform Enforcement of Foreign Judgment Act. **(See Appellant's Brief, Pg. 12)**

Pursuant to Georgia law relating to the filing of a foreign judgment under the Uniform Act in Georgia, in order to relitigate the same suit with the same parties, one must petition to have the final domesticated judgment set aside or reversed on appeal. **O.C.G. A. § 9-11-60 (d)**. This is not what appellee did. (R. 4-12) It is uncontroverted that appellee petitioned the New Jersey Superior Court for modification of custody on March 3, 2005 by fax. (R-79) Unbeknownst to appellant or her attorney, (R-80) at a hearing held on March 17, 2005, appellee was granted physical and residential custody. (Pl's Ex. 1, Pg. 79) Appellant petitioned the New Jersey Superior Court to vacate the order and was denied. She appealed, and the New Jersey Appellate Court agreed with appellant and vacated the trial court's order. (R. 77-85) (See Appellant's Brief, Pg. 8) Appellee's second motion for modification of custody is clearly based upon the fact that he no longer had custody pursuant to the New Jersey Appellate Court decision. (R- 6, Para 15) The New Jersey Appellate Court's basis for vacating the trial court's order did

not in any way affect the finality or the result of their decision. The result was that appellee did NOT have valid custody and his petition for custody was dismissed. (R-84-85) This result is what appellee attempted and succeeded in modifying. (R. 60-72) Georgia's common law doctrine of res judicata is codified under **O.C.G.A. § 9-12-40**, which provides that: "A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to *all* matters put in issue *or* which under the rules of law might have been put in issue in the cause wherein the judgment was rendered *until* the judgment is reversed or set aside." See ***Doman v. Banderas***, 231 Ga. App. 229, 98 FCDR 1285, 499 S.E.2d 98 (1998), ***Lawson v. Watkins***, 261 Ga. 147, 148, 401 S.E2d 719 (1991). It is undisputed that appellee petitioned for modification of custody in New Jersey and in Georgia; (R-79, R. 4-12) that the identity of the parties is the same; (R-77, R-4) and that there was adjudication by a court of competent jurisdiction. (R.77-85)

The last prerequisite, is if the party against whom the doctrine of res judicata is raised had a full and fair opportunity to have litigated the issues in the first action. ***See Fowler v. Vineyard***, 261 Ga. 454, 455, 405 S.E.2d 678 (1991) See ***Chrison v. H&H Interiors, Inc. et al. Holt v. Chrison***, 232 Ga. App. 45, 98 FCDR 1434, 500 S.E.2d 41 (1998) In ***Chrison***, supra, Chrison attempted to relitigate a claim in Georgia that was previously litigated in Tennessee ruled adversely against him. Tennessee law was to dismiss with prejudice due to a failure to prosecute on Chrison's part. This court concluded: "[w]e find that Chrison had a full and fair opportunity to litigate all issues, including issues of jurisdiction...[t]hat the Plaintiff chose not to prosecute the case is of no moment to the Court...The Plaintiff chose to ignore the Tennessee rules at his own peril." Appellee was served with a notice of appeal in the foreign state of New Jersey

and appellee willingly chose not to partake in the appeal process and did not file a response brief in defense thereof. (See R-77)[1] Therefore, appellee had a full and fair opportunity to attempt to persuade the New Jersey Appellate Division that their ruling was somehow error. "Where jurisdictional issues are raised and decided against a litigant in a foreign court, the foreign judgment is given full faith and credit not only as to the merits of the suit but also as to the finding of jurisdiction."

See ***Van Buskirk v. Great American Bank***, 175 Ga. App. 101 (332 S.E.2d 394) (1985).

Appellee was allowed to circumvent the procedural directives under **O.C.G.A. § 9-11-60(d)** (See Appellants brief Pg 12-13) The trial court abused its discretion when it issued a second and different order without having the first order vacated or set aside.

CONCLUSION

Appellant respectfully moves that this Court for the reasons set out above and in the initial Brief of Appellant, to reverse the court below as to each error presented as to the grant of modification of custody of minor child to Appellee.

CERTIFICATE OF MAILING

I hereby certify, that three true and correct copies of the **Reply Brief of Appellant** was mailed via UPS overnight (to Georgia Appellate Division), one copy via certified postage prepaid, to remaining parties stated below:

Hallmark Bowman & Hallmark
Anthony Hallmark
3818 Powder Springs Rd

[1] See Pet. App. 26a of New Jersey Appellate Court decision stating Horton did not file a brief.

Powder Springs, GA 30127
(770) 943-1106

Court of Appeals State of Georgia
Clerk of Court
47 Trinity Avenue, Suite 501
Atlanta, GA 30334
(404) 656-3450

This the 4th day of August, 2009

Respectfully submitted,
/s/ Deborah Hinton-Lynch
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IN THE SUPREME COURT
OF GEORGIA

DEBORAH HINTON-LYNCH Petitioner, v. CHESARE HORTON, Respondent.	* * * * * * * * * * *	APPEAL NO. A09A1934 from the Superior Court of Cobb County

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR CERTIORARI

Petitioner, Deborah Hinton-Lynch (Appellant in the Court of Appeals of Georgia and hereinafter referred to as "Lynch"), pursuant to Rule 40 of this Court, petitions for certiorari to be granted and for the reversal of the opinion of the Court of Appeals of Georgia entered on March 3, 2010, a copy of which is attached as **Exhibit A.**

INTRODUCTION

This case involves the modification of custody of minor child from Appellant-Petitioner, Deborah Hinton-Lynch to Appellee-Respondent, Chesare Horton on December 19, 2008 by Cobb County Superior Court. (Opinion pg. 5) Petitioner filed a timely notice of appeal on December 31, 2008 (R-3) and on March 3, 2010, the Court of Appeals affirmed the Cobb County Superior court's modification of custody in favor of Horton. (Exhibit A) On March 15, 2010, Lynch's motion to extend time to file Petition for Certiorari was granted. (Exhibit B)

Petitioner avers that; 1) the Court of Appeals improper assertion that Petitioner raised the defense of res judicata for the first time on appeal thereby dismissing her direct challenge of subject matter jurisdiction altogether of the lower court (Opinion pg. 5, Para 1.); 2) the Court of Appeals improper assertion that the record was "inconclusive to either affirm or deny as to whether Respondent had counterclaimed for a change of custody in violation of OCGA § 19-9-23 (a)(c)(1)(2) (Opinion pgs. 6-7); and 3) the Court of Appeals affirming the trial court's transfer of child custody to respondent (Opinion pgs. 7-8) who illegally absconded with minor child from another state in absence of an "extreme emergency" therefore violating a Public Policy of Georgia, are all grounds warranting a grant of certiorari for review by this Honorable court.

PETITIONER'S CORRECTED STATEMENT OF FACTS IN RESPONSE TO COURT OF APPEALS INACCURATE STATEMENT OF FACTS

Lynch objects to the Court of Appeals Statement of Facts due to the inaccuracies memorialized which contrast with the record on appeal. Petitioner controverts and corrects inaccurate Statement of Facts as follows:

Lynch objects and corrects the Court of Appeals Statement of Facts contained on Pg 2 lines 11-14 of the Opinion of the Court of Appeals as not being supported by record. Lynch's grant of sole custody and Horton's obligation to pay child support were incorporated in a consent order dated March 27, 2002. (Def. Ex. B 101-104). Horton's legitimization and supervised visitation hearing was heard and granted on April 25, 2002. (Def. Ex. C 105-107)

Lynch objects and corrects the Court of Appeals Statement of Facts contained on Pg 2 lines 14-18 as not being supported by record. The "several" occasions that Horton had no visitation with T.H. was not Horton's testimony; Horton testified that between August and December 2004, he allegedly attempted visitation with the child three times (T 39 ll. 20-25 thru T 40 ll. 1-6).

Lynch objects and corrects the Court of Appeals Statement of Facts contained on Pg 3 lines 5-7 as not being supported by record. Lynch's petition for reinstatement of supervised visitation against Horton was scheduled initially on January 4, 2005 not January 30, 2005. (T 11 ll. 24-25 thru T 12 ll. 1-5)(Def. Ex. F 111) [1] The New Jersey trial court hearing denying Lynch's application for supervised visitation was on January 31, 2005. (T100, Pl's Ex.

[1] January 30, 2005 fell on a Sunday in which all courts are closed.

14)

Lynch objects and corrects the Court of Appeals Statement of Facts contained on Pg 4 lines 17-18. Lynch alerted Horton that she planned to pick up the child on September 24, 2008 not September 25, 2008. Horton's attorney had already drafted, notarized and signed the Motion for Emergency Temporary Custody order along with attached Verification on September 24, 2008. (R. 4-12)

WHY CERTIORARI SHOULD BE GRANTED IN THIS CASE

Certiorari should be granted because the Georgia Court of Appeals has issued an order in this instant case, although not precedential but binding nevertheless, which contradicts a well-settled principle that a party's challenge of a court's subject matter jurisdiction cannot be dismissed. The rulings in this case not only contradict prior precedent Georgia Court of Appeals rulings, but additionally this Honorable Courts' prior rulings regarding the right to challenge a court's jurisdiction if found lacking.

It is axiomatic that if left binding, the decision by the Georgia Court of Appeals in this case, would be of gravity and public concern as it would resonate to every citizen of Georgia and potentially nationwide that, *any* court can authorize an order in direct violation of a statute prohibiting such authority and it will be deemed valid. There can be no confidence in a judiciary system when judge's who have taken oaths to uphold and apply the laws of the Georgia Constitution and the General Assembly can arbitrarily disregard the law at their own discretion. Lynch avers that if truly the trial court lacked subject matter jurisdiction to render their order then the Georgia Court of Appeals also lacked jurisdiction to affirm the order on the merits since a void order is a nullity and presents nothing for the Court of Appeals to review. Due to the facts and statutes

Lynch relied on and relies on in support of her issues, certiorari should be granted to appeal this error by the Georgia Court of Appeals in dismissing Lynch's challenge of the lower court's lack of jurisdiction.

For future as well as present Georgian's, is a more state-specific public concern and gravity; the violation of Georgia's Public Policy regarding parental interference of child custody. The issue of a non custodial parent interfering with a custodial parents custody rights was so paramount that the General Assembly enacted OCGA §16-5-45(c)(1) as a prohibitory course of action. The underlying issue in this present case is indeed parental abduction and the granting of legal custody to a non-custodial parent who had illegally taken possession of the minor child at issue in absence of an emergency. The undisputed facts coupled with the supporting statutes in the case at bar, were simply ignored by the lower court and affirmed on appeal by the Georgia Court of Appeals in direct contravention of the Public Policy of Georgia as a matter of law.

Public policies are generally constructed to address public issues and thereafter laws are enacted as a safeguard for the protection of citizens to not be injured by other citizens. Unless certiorari is granted, the Georgia Court of Appeals' affirmation of the lower court's ruling in this case would very well succeed in undermining the very premise upon which the public policy of OCGA § 16-5-45(c) (1) was enacted for; specifically, to protect parents who are legal custodial parents by way of a valid court order from having their child(ren) abducted by the non-custodial parent.

Lastly, this case also presents a case of first impression which is grounds for grant of certiorari. There have not been any precedent holdings relating to interstate interference of custody decided under OCGA §16 5 45 (c) (1). Petitioner implores this

Honorable Court to accept this petition and allow appeal to expound upon and then establish as to whether: (a) an individual commits the offense of interstate interference of child custody upon satisfying all factors under OCGA § 16-5-45 (c) (1) or, (b) the offense of interstate interference of child custody is only deemed to be committed upon the issuance of a warrant? If (a) is determined in the affirmative, then what weight should the trial court afford, if any, to the offending party after concluding that he/she satisfied all factors under OCGA § 16-5-45 (c) (1) who invokes Georgia's jurisdiction for sole custody of a minor child?

Petitioner humbly requests that the Georgia Supreme Court grant certiorari on the grounds that the Court of Appeals rendered conflicting opinions decided in prior precedent cases in contrast to the case at bar; on the grounds that the Court of Appeals violated Georgia's Public Policy which is of public concern and gravity, and upon the grounds that this case is a case of first impression which the petitioner desires this Honorable court to establish as precedence for direction to potentially future parties similarly situated.

ENUMERATION OF ERRORS

I. The Court of Appeals erred by precluding appellate review of petitioner's direct challenge of the lower court's lack of subject matter jurisdiction by asserting that petitioner raises the defense of res judicata for the first time on appeal.

a. The Court of Appeals erred by failing to apply the doctrine of stare decisis in this instant case with substantially similar facts as in prior precedent cases.

II. The Court of Appeals erred by precluding appellate review of petitioner's second enumerated issue that respondent had violated OCGA 19-9-23(a)(c)(1)(2) for bringing a change of custody suit as a counterclaim by asserting that the record was inconclusive.

III. The Court of Appeals erred by affirming the unauthorized removal of minor child by the non-custodial parent in absence of an extreme emergency in violation of Georgia's Public Policy.

JURISDICTIONAL STATEMENT

The Georgia Supreme Court, and not the Georgia Court of Appeals, has jurisdiction under The Georgia Const., Art. 6, § 6, Paragraph V to hear this case and to grant certiorari, as this is a matter of great public importance and gravity.

ARGUMENT AND CITATION OF AUTHORITY

I. THE COURT OF APPEALS ERRED BY PRECLUDING APPELLATE REVIEW OF PETITIONER'S DIRECT CHALLENGE OF THE LOWER COURT'S LACK OF SUBJECT MATTER JURISDICTION BY ERRONEOUSLY ASSERTING THAT PETITIONER RAISES THE DEFENSE OF RES JUDICATA FOR THE FIRST TIME ON APPEAL.

The Georgia Court of Appeals opined that Lynch raised the defense of res judicata for the first time on appeal as her first enumerated issue therefore barring Appellate review. (Opinion pg. 5) This bald assertion is incorrect. *Nowhere* within Lynch's opening brief are the words "res judicata" found within the first or any of the other enumerated issues. Lynch's first enumerated error specifically states that the trial court's second order was void pursuant to OCGA § 9-11-60(d). By dismissing her first enumerated issue altogether, the Georgia Court of Appeals has essentially denied Lynch's challenge as to whether the trial court's order was indeed void for lack of jurisdiction. "This Court and the Court of Appeals are courts of review." 1983 Ga. Const., Art. VI, Sec. V, Par. III; Art. VI, Sec. VI, Par. II. "As appellate courts, we are courts for the correction of errors of law made by the trial courts." *Mills v. State*, 188 Ga. 616, 623 (4 S.E.2d 453) (1939). "[T]he facts are undisputed, and the issue before us is whether the trial court's order granting... second motion to set aside the default judgment was null and void for lack of subject matter jurisdiction. This question is one of law, which we review de novo. [Cit.]" See *Guthrie v. Wickes et al.*, 295 Ga. App. 892, (673 S.E.2d 523) (2009).

In the instant case at bar, Lynch's first enumerated issue was supported with specificity to cited authority and reference to the record that the

trial court had rendered a void order in violation of OCGA § 9-11-60(d). (Appellant's Opening Brief Pgs. 11-13) The obligation to ascertain whether the trial courts' judgment was void in *Guthrie*, supra. was withheld in this instant case. "By statute in Georgia, '(t)he judgment of a court having no jurisdiction of the person or subject matter, *or void for any*...cause, is a mere nullity and may be so held in any court when it become material to the interest of the parties to consider.' OCGA §17-9-4 [Cits.] If the judgment is a nullity and void, the right to attack it is not lost by laches [cit.]; nor is it waived by the failure to attack it before, since it is void, and not voidable...'[Cit.] See *Barrett v. State*, 183 Ga. App. 729, 730 (1), 360 S.E.2d 400 (1987).

In *Felix et al. v. The State*, (S99G0120) (GA Supreme) (1999) 523 S.E.2d 1 (Ga. 1999), this Honorable court outlined:

> '[T]he General Assembly has made it clear that all points raised in an appeal are to be considered by the appellate court. In addition to the statutory mandate that the APA be "liberally construed so as to bring about a decision on the merits of every case appealed and to avoid ... refusal to consider any points raised therein" (OCGA § 5-6-30), the legislature, in enacting OCGA § 5-6-48 (f), has imposed on the appellate courts a statutory duty to discern what errors an appellant is attempting to articulate. "[If] the enumeration of errors fails to enumerate clearly the errors sought to be reviewed[,]" the appellate court is nonetheless required to consider the appeal "where it is apparent

> from the notice of appeal, the record, the enumeration of errors, or any combination of the foregoing, ... what errors are sought to be asserted upon appeal. . ." OCGA § 5-6-48 (f).'

"The solemn duty devolves upon this court to inquire into its jurisdiction to entertain each appeal and review the alleged errors of the trial court." *Paine et al. v. Nations. Cochran et al. v. Nations*, A09A1324, A09A1325. (Ga. App.) (2009) Citing *Byrd v. Goodman*, 192 Ga. 466 (1) (15 S.E.2d 619) (1941).

The Court of Appeals in this instant case failed to give due consideration to the enumeration of error within petitioners' opening brief, and the evidence on record, thereby failing to discharge its obligation to review an issue which was properly before it.

A. THE COURT OF APPEALS ERRED BY FAILING TO APPLY THE DOCTRINE OF STARE DECISIS IN THIS INSTANT CASE WITH SUBSTANTIALLY SIMILAR FACTS AS IN PRIOR PRECEDENT CASES.

The Court of Appeals decision in this instant case conflicts with a prior decision as was held in *Arrowhead Alternator Inc., et al. v. CIT. Communications Finance Corporation*, 268 Ga. App. 464, (602 S.E.2d 231) (2004) which Lynch relied on in her first enumerated error in her opening brief. (Appellant's Opening Br. Pg. 11-13). In *Arrowhead*, supra. CIT had obtained a default judgment against Arrowhead in a New Jersey court. CIT filed a petition to domesticate the New Jersey judgment in the Superior Court of Clayton County, GA pursuant to the Uniform Enforcement of Foreign Judgments Law (hereafter "Uniform Act"). See OCGA § 9-12-130 thru OCGA § 9-12-138. Arrowhead moved to set aside the New Jersey judgment and the trial court

denied Arrowhead's motion to set aside the domesticated judgment on October 15, 2003. The trial court issued a separate judgment on October 20, 2003, and ordered Arrowhead to pay CIT exactly the same amount as was ordered in the original New Jersey default judgment. Arrowhead did not seek to appeal from the denial of its motion to set aside, but filed a direct appeal of the October 20, 2003 judgment. The Georgia Court of Appeals opined that the appeal was dismissed for lack of jurisdiction because the only appealable order was from the October 15, 2003 judgment. The Court of Appeals provided sua sponte; "[w]hen a final judgment has once been entered, no second or different judgment may be rendered between the same parties and in the same suit, *until* the first shall have been vacated and set aside or reversed on appeal or error. Where a second judgment is entered by a court after the first judgment has become final, the second judgment is *void*." *Arrowhead Alternator*, supra.

Lynch avers that the opinion reached in *Arrowhead*, supra. by the Court of Appeals, conflicts with the decision reached in the case at bar though substantially similar facts are present.

Lynch obtained a judgment from the New Jersey Appellate court (as did CIT in *Arrowhead*, supra.) on September 23, 2008, which stipulated their lower court lacked subject matter jurisdiction to modify Georgia's custody order pursuant to the Uniform Child Custody Jurisdiction Enforcement Act thereby, vacating Horton's custodial rights. (R.77-85) In this instant case, Lynch properly domesticated a New Jersey Appellate Court judgment under the Uniform Act (as CIT did in *Arrowhead*, supra.). On September 24, 2008, Lynch was instructed and proceeded to file a hand-written petition and filing fee for domestication and enforcement of the New Jersey judgment in the Superior Court of Cobb County pursuant to the Uniform Act. (R. 76) See OCGA § 9-12-130 thru

OCGA § 9-12-138. The petition was attached with an authenticated copy of the New Jersey judgment and an affidavit was filed on September 25, 2008 as required by OCGA § 9-12-132 and OCGA § 9-12-133. (R. 77-85) (R-86) *See Hammette v. Eickemeyer*, 203 Ga. App. 243, (416 S.E.2d 824)(1992).[2] Notably, petitioner addresses that the Court of Appeals failed to acknowledge in their opinion that Lynch domesticated her foreign judgment under the Uniform Enforcement of Foreign Judgments Law. (Opinion pg. 4) *See* OCGA § 9-12-130 thru OCGA § 9-12-138. (Appellant's Opening Brief pgs. 11-13). To further confuse the undisputed facts on record, the Court of Appeals eludes that Lynch's domesticated judgment was somehow a *custody judgment* by relying on *Wylie v. Blatchley*, 237 Ga. App. 563, 564 (1) (515 S.E.2d 855) (1999) which is misleading or in the alternative, misplaced. (Opinion pg. 6).

In *Wylie*, supra. the issue that was before the court was the improper modification of an alleged domesticated custody order. OCGA § 19-9-6 (4) provides the definition of sole custody: "[m]eans a person, including, but not limited to, a parent, has been awarded permanent custody of a child by a court order..." The case at bar is distinguishable because the New Jersey Appellate order was not a custody order stipulating who was awarded custody of the minor child but a judgment from an Appellate court *vacating* custody upon Lynch's application on appeal to challenge jurisdiction of New Jersey's lower court. (R. 77-85) Since the procedure for domesticating a foreign non-custody judgment under the Uniform Act (OCGA § 9-12-130) is different from registering a foreign custody order as provided under Georgia's Uniform Child Custody Jurisdiction and Enforcement Act, (OCGA § 19-9-85) it then follows that any relief sought from a final judgment would

[2] Additionally, New Jersey has also adopted their own version of the Uniform Enforcement of Foreign Judgment Act codified under N.J.S.A. § 2A:49A-25 et seq.

be based upon the type of judgment and remedies proscribed within the Georgia Appellate Practice Act, Title 9. Chapter 11 Article 1. The Court of Appeals have repeatedly upheld the principle of law that when a foreign judgment is filed under the Uniform Act, it may be collaterally attacked only under OCGA § 9-11-60(d). See *Sanwa Leasing Corporation v. Stan Hunt Construction Company, Inc. et al.*, 214 Ga. App. 837, (449 S.E.2d 347) (1994). In contrast, a final custody order can be relitigated and modified upon Motion of Reconsideration (OCGA § 9-11-52)(c) or by direct appeal. (OCGA § 5-6-34)

Horton (in contrast to *Arrowhead*, supra.,) did **not** move to set aside Lynch's domesticated final judgment or seek reversal on appeal in the foreign state before attempting and succeeding at a second "bite at the apple" for a change of custody. (Appellant's Opening Brief pgs. 11-13). The Court of Appeals concluded from the record that Horton petitioned for modification of custody on March 3, 2005 with custody being granted on March 17, 2005 in the New Jersey trial court which was subsequently rendered adversely against him (Opinion pg. 4) and further concluded that Horton petitioned in Georgia on September 25, 2008 under the same claim for modification of custody with the second judgment modified in his favor. (Opinion pgs. 4-5). Nowhere was it concluded that Horton had *first* successfully reversed on appeal the New Jersey Appellate judgment or that it had petitioned and sustained a motion in Georgia to set aside the domesticated foreign judgment before relitigating the second action for modification. (Appellant's Opening Brief Pgs. 12-13).

Thus, the conflict is that the Court of Appeals did not apply the same principle of law and render the same holding in this instant case as was held in *Arrowhead*, supra. which was; that it lacked jurisdiction to entertain this instant appeal because the second order rendered by the Cobb County

Superior court was void. "It is well settled that when a trial court enters a judgment where it does not have jurisdiction, such judgment is a mere nullity; but an appeal from such an illegal judgment will not be dismissed but instead, the void judgment will be reversed." *Darden et al. v. Ravan et al.*, 232 Ga. 756, (208 S.E.2d 846) (1974).

The Court of Appeals upon inspection of the record; enumeration of error, and citation of authority and briefs on record, should have held in this instant case as they held in *Arrowhead*, supra., that the December 19, 2008 Cobb County trial courts' second judgment was void ab initio because the New Jersey judgment, as properly domesticated in Georgia under the Uniform Act, was neither reversed on appeal nor set aside. Essentially, Arrowhead's denial of their motion to set aside and respondent failure to motion to set aside both lead to the same result; a final domesticated foreign judgment in Georgia. "The proper method for attacking a foreign judgment filed in Georgia under the Uniform Act is a motion to set aside under OCGA § 9-11-60 (d). See *Arnold v. Brundidge Banking Co.*, 209 Ga. App. 278, (433 S.E.2d 388) (1993).

"Under the doctrine of stare decisis, when a "court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same." (Citation and punctuation omitted.) *Norris v. Atlanta & West Point R. Co.*, 254 Ga. 684, 686, 333 S.E.2d 835 (1985). "The doctrine of stare decisis...does not act as a bar...[I]t does, however, dictate the conclusion of law to be made upon a given set of facts." See *Thomas County Board of Tax Assessors v. Thomasville Garden Center, Inc.*, A05A1870, (627 S.E.2d 192) (2006). "The Supreme Court has jurisdiction to review any decision of the Court of Appeals by certiorari so long the criteria of the writ are

satisfied." See *State v. Tyson*, 273 Ga. 690 (544 SE2d 444) (2001). "The absence of a reported opinion does not prevent further review." See *Taylor v. State*, S03G1056, (Ga. 2004).

Thus, the Court of Appeals decision in *Arrowhead*, supra. conflicts with the decision rendered in the case at bar with substantially similar facts, thereby presenting grounds to grant certiorari warranting this Honorable Courts' review.

CONCLUSION

The plain language of the statute requires that a domesticated foreign judgment filed under the Uniform Act can only be reheard upon the sustaining of a motion to set aside which is a matter of law. The plain language of the statute prohibits a change of custody suit to be brought as a counterclaim, is a matter of law. The Georgia General Assembly by its enacting and in its amendments of HB 219 and HB 968, promulgated that interstate interference of child custody is prohibitory as a matter of public policy and the clear intent as set forth under OCGA §16-5-45 (c)(1) is to provide protection of those rights vested to a legal custodian by law. The holding of the Court of Appeals in this case is contrary to prior holdings of the Court of Appeals and this Honorable Court as outlined in each of Petitioner's enumeration of errors.

As to the aforementioned grounds set forth, petitioner moves this Honorable Court to grant this Petition for Certiorari for further review and upon appeal to reverse the errors made by the Court of Appeals and the lower court in transferring custody of minor child to Respondent.

Respectfully submitted,
/s/ Deborah Hinton-Lynch
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CERTIFICATE OF MAILING

I hereby certify, that one original and seven correct copies of the **Petition for Writ of Certiorari** was mailed via UPS overnight (to Supreme Court of Georgia), one copy via certified postage prepaid, to remaining parties stated below:

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This the 13th day of April, 2010

Respectfully submitted,

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IN THE SUPREME COURT
OF GEORGIA

DEBORAH HINTON-LYNCH Petitioner, v. CHESARE HORTON, Respondent.	* * * * * * * * * * * *	Supreme Docket No. S10C1216 APPEAL NO. A09A1934 from the Court of Appeals

PETITIONER'S REPLY TO OPPOSITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION OF THIS COURTS' JURISDICTION

Respondent offers a boilerplate statement that the Petition for Certiorari is neither premised on "great concern, gravity nor importance to the public" to justify this court's exercise of its jurisdiction, (Opp. Brief, Pg. 9) but he nowhere contests the specific points made in the petition.

ARGUMENT AND POINTS OF AUTHORITY

I. RESPONDENT DOES NOT CONTEST WITH SPECIFICITY THE POINTS OF THE PETITION.

Respondents' Opposition Brief is almost a photocopy of his Appellee's Brief filed in the Court of Appeals (Appellee's Brief, Pgs. 13-26) which neither addresses nor contests Petitioner's challenge to the trial court's lack of subject matter jurisdiction to render an order transferring custody of minor child to respondent nor to the Georgia Court of Appeal's lack of subject matter jurisdiction in affirming the merits of a void order.

A. RESPONDENT NEITHER ADDRESSES NOR CONTEST THAT THE COURT OF APPEALS LACKED SUBJECT MATTER JURISDICTION TO AFFIRM ON THE MERITS.

Petitioner demonstrated that the Court of Appeals rendered a conflicting opinion in this instant case than rendered in a prior precedent case

with substantially similarly situated facts. (Pet. for Cert, Pg. 11-17) Respondent simply offers that the Court of Appeals decision in this case "is not in real conflict with any other decision of the Georgia Court of Appeals." (Opp. Brief, Pg. 10) Yet, respondent does not demonstrate that the Court of Appeals did not render a conflicting opinion in any case cited by petitioner. Respondent further asserts that petitioners' request for grant of certiorari does not meet the threshold of Rule 40 because the Court of Appeal's ruling was correct and that it was narrowly tailored to this particular family. (Opp. Brief, Pg. 10) Again, respondent misses the mark.

This Honorable Court itself looks to other sister states as well as the Eleventh Circuit for direction in construction of developing law. "[H]aving surveyed the approaches of other jurisdictions in determining what movements are more than merely incidental to other criminal activity, we hereby adopt the test first articulated in *Govt. of Virginia Island v. Berry*, 604 F.2d 221 (3d Cir. 1979) and since adopted by various of our sister states as well as the Eleventh Circuit in its construction of the federal kidnapping statute..." (*Garza v. The State*, 284 Ga. 696, (670 S.E.2d 73) (2008)). As with this Honorable Court, it follows that other courts can and do adopt reasoning from sister state decisions. Therefore, the opinion rendered in this case, if left binding, could lead to other court's rendering their own void orders by "shadowing" the Georgia Court of Appeals departure from stare decisis. Additionally, other Supreme Courts in other jurisdictions also adhere to jurisdictional principles of law when faced with whether their Appellate courts lacked jurisdiction to

affirm on the merits of a void order from a lower court. "When a lower court lacks the authority to exercise its jurisdiction to adjudicate the merits of the claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or questions presented to the lower court." *Kaplan v. McClurg*, 271 Neb. 101, 710 N.W. 2d 96 (2006) (cited in *Vanhorn v. Nebraska State Racing Commission v. Nebraska State Racing Commission and Dennis Oelschlager*, (No. S-06-103, No. S-06-105), 273 Neb. 737, 732 N.W. 2d 651, (2007). "Subject matter jurisdiction is vested by statute and establishes the court's authority to hear and decide a particular type of action. Parties cannot confer subject matter jurisdiction by consent, waiver, or estoppels, and parties cannot convey subject matter jurisdiction on a court by failing to object to the court's lack of jurisdiction. If the district court lacks jurisdiction to make a ruling, an appellate court does not acquire jurisdiction over the subject matter on appeal." *Kingsley v. Kansas Department of Revenue*, No. 98,301 (2009) (Unpublished)

In *Arrowhead Alternator Inc., et al v. CIT Communication Finance Corp.*, 268 Ga. App. 464, (602 S.E.2d 231) (2004), the Court of Appeals, *sua sponte*, opined that it did not have jurisdiction to entertain that case because the order being appealed was *void*. This determination is germane to petitioner's appeal and is indeed her first enumerated issue as she contends the Georgia Court of Appeals did not have jurisdiction to reach the merits in this instant case. (Appellant's Opening Br. Pg. 17) In Georgia, "subject matter jurisdiction is conferred to a court by state law..." *See* OCGA § 15-

1-2; *Bradley v. British Fitting Group, PLC*, 221 Ga. App. 622 (1), (472 S.E.2d 146 (1996)). Jurisdiction is to be adhered to in *every* case, in *every* court, in *every* state, and by *every* judge who took oaths to which all are bound by the Supremacy Clause of the United States Constitution, Article 6, Clause 2. This article provides:

> "...[T]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the **Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State** to the Contrary notwithstanding... and all executive and judicial officers shall be bound by Oath or Affirmation to support this Constiution..."

Notably, this Honorable Court clarified its position as it relates to the Georgia Appellate Court exercise of jurisdiction to entertain trial court orders on appeal which lack jurisdiction as recently as May 17, 2010, in *Houston County v. Harrell*, S09G2004, (2010) when it opined, "[A]ccordingly, the trial court did not have authority to enter its order of July 30, 2008 purporting to make the earlier grant of partial summary judgment final under O.C.G.A. § 9-11-

54(b), and thus, the judgment of the Court of Appeals reversing the grant of partial summary judgment must be reversed." Id. See *Weatherbed v. State*, 271 Ga. 736, 738 (524 S.E.2d, 452) (1999).

In *Houston*, supra, Harrell was cited for speeding in Houston, GA and paid her fine. A Sentinel probation officer who was supposed to have destroyed the paperwork, did not and issued a warrant for Harrell's arrest and she was jailed before all charges were dismissed. Harrell sued Houston County and moved for summary judgment which was granted on November 21, 2007. Harrell moved for reconsideration of the grant of partial summary judgment; her motion was denied on February 29, 2008. On March 12, 2008, Harrell filed a notice of appeal pursuant to O.C.G.A. § 9-11-56 (h); the Court of Appeals dismissed that appeal because the notice of appeal was not filed within 30 days after the entry of an appealable judgment. Harrell moved for an "order of finality" under O.C.G.A. § 9-11-54(b) and on July 30, 2008 , the trial court entered an order stating that the November 21,2007 grant of partial summary judgment was certified as a final judgment under O.C.G.A. § 9-11-54(b).

Harrell filed her *second* notice of appeal, and on consideration of this appeal, the Court of Appeals reversed the trial court's grant of partial summary judgment. This court opined that, "Although the issue can be framed using the elements of res judicata, the appellate issue is more fundamental; a party is not entitled to a second appeal from a single order. Because Harrell had a right to a direct appeal and exercised that right, she could not use

procedural maneuvers to contrive a second appeal." "[L]itigants cannot under any circumstances dictate the procedural or jurisdictional rules of this Court." *Walker v. Estate of Mays*, 279 Ga. 652, 653 (1) (619 S.E.2d 679) (2005) (Citations and punctuation omitted.). *Harrell's* course of action is precisely what respondent utilized in the Cobb County Superior court on December 19, 2008 to regain a favorable custody decision (R. 60-72) after the adverse decision was handed down by the New Jersey Appellate court removing his void custodial award. (R. 77-85)

Respondent, by relitigating custody for a second time without *first* setting aside a valid appellate court order or appealing that order in the state of rendition, circumvented the procedural directive under O.C.G.A. § 9-11-60(d) which allows an attack on a domesticated foreign judgment filed under the Uniform Enforcement of Foreign Judgments Law. (Pet. for Cert. Pg. 11-16)

"OCGA § 9-11-60 clearly provides that only a judgment void on its face "may be attacked in any court by any person...OCGA § 9-11-60 (a)...other judgments must be attacked by motion, and only in the court of rendition." OCGA § 9-11-60 (b) See *Moseley et al. v. Interfinancial Management Company et al., Leventhal v. Moseley* et al. (A96A1615, A96A2435) 224 Ga. App. 80, (479 S.E.2d 427) (1996)[1]

Though respondent attempts to downplay the

[1] Respondent does not argue that the New Jersey Appellate judgment is void.

outright significant public importance of this case, the United States Supreme Court in its ruling in *Troxel v. Granville*, 530 U.S. 57, (2000), trumps that attempt. The opinion announced by retired Justice O'Connor supports petitioners' contention that the right to raise one's child is of weighted concern and public importance. "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." *Troxel*, supra.

Georgia is the original state that granted petitioner sole custody of minor child. (Def. 101-104) Respondent, by forum-hopping, successfully modified Georgia's custody order in New Jersey *after* he absconded with minor child without court authority. (Opinion pg. 4) Petitioner appealed and the New Jersey Appellate court vacated their lower court's order granting respondent custody. (R.77-85) Georgia has ALWAYS had jurisdiction to entertain a petition to modify its own custody order *when warranted* and petitioner has been arguing that to the Georgia Superior court since June of 2006 to no avail until the issuance of the New Jersey Appellate opinion affirming petitioner's position. (Pl. Exhibit 3, Pg. 2, Para 12, Pg. 3, Para 1-4) The trial court's rendering of a void order transferring custody and denying a legal custodian their rights under the United States Constitution, Georgia's Constitution

and Georgia's state law, is truly manifest injustice and is worthy of certiorari. This petition is not to review the sufficiency of evidence as respondent would lead this court to believe (Opp. Brief, Pg. 2) nor is this to correct a minor error; but to allow justice to reign supreme.

> "Minor errors, even if quite obvious, or important errors if their existence be fairly doubtful, may be adhered to and repeated indefinitely; **but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction, is to correct it.** When an error of this magnitude and which moves in so wide an orbit competes with truth in the struggle for existence, the maxim for a supreme court, supreme in the majesty of duty as well as in the majesty of power, is not stare decisis, but fiat justitia ruat caelum [let justice be done, though the heavens should fall]."

(Citation omitted.) See *Humthlett v. Reeves*, 211 Ga. 201, 216(1), 85 S.E.2d 25 (1954).

For five years a minor child has **not** been under the custody and control of her legal custodial parent but under the control of the non-custodial parent who possessed two different void orders; one

which the New Jersey Appellate Court correctly vacated; the second, a void order ironically reinstated by the very court who had given petitioner custody in the first instance, which is Georgia. Though the Cobb County Superior court rendered a void order which is a mere nullity and ineffectual, it appears "cloaked" in validity and therefore sustains enforcement protection which has infringed and thus barred the legal rights of the petitioner to court-ordered custody of minor child, thereby producing manifest injustice. Yet, any such void order would produce the same result in ANY case when it denies a litigant protection to which he/she should be afforded under the laws of their state. The Court of Appeals, by ignoring the glaring lack of subject matter jurisdiction of both itself and the lower court, solidifies exactly why certiorari should be granted in this instant case.

CONCLUSION

Respondent neither addresses nor contest with specificity why this Honorable Court should not grant certiorari as to each of petitioner's enumerated issues.

As to the aforementioned issues set forth, petitioner humbly moves this Honorable Court to grant this Petition for Certiorari for further review and upon appeal to reverse the errors made by the Court of Appeals and the lower court in transferring custody of minor child to Respondent.

Respectfully submitted,
/s/ Deborah Hinton-Lynch
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Bladensburg, MD 20710
(240) 271-1175

CERTIFICATE OF MAILING

I hereby certify, that one original and seven true and correct copies of the **Petitioner's Reply to Opposition For Writ of Certiorari** was mailed via UPS Priority (to Supreme Court of Georgia), one copy via certified postage prepaid, to remaining parties stated below:

Hallmark Bowman & Hallmark
Anthony Hallmark
3818 Powder Springs Rd
Powder Springs, GA 30127
(770) 943-1106

This the 16th day of June, 2010

Respectfully submitted,

/s/ Deborah Hinton-Lynch
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(240) 271-1175

IN THE SUPREME COURT
OF GEORGIA

DEBORAH HINTON-LYNCH Petitioner,	*	
	*	CASE NO.
v.	*	S10C1216
CHESARE HORTON, Respondent.	*	

MOTION FOR RECONSIDERATION

Deborah Hinton-Lynch
5608 Annapolis Rd.
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(240) 271-1175
Pro Se

COMES NOW Petitioner Deborah Hinton-Lynch pursuant to Rule 27 of the Supreme Court of Georgia, and moves this Court to reconsider its ruling on September 7, 2010, denying petitioner's Writ of Certiorari in the above-styled case. Petitioner purports that the Georgia Court of Appeals committed such clear error of law in the above-styled case, that the result of manifest injustice towards petitioner denying her a constitutionally-protected liberty interest to rear her child, should be reviewed and vacated. Petitioner relies on the attached Brief in Support of Motion of Reconsideration.

This 16th day of September, 2010

Respectfully submitted,
/s/ Deborah Hinton-Lynch
Deborah Hinton-Lynch, Pro Se
5608 Annapolis Rd.
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PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

Petitioner, Deborah Hinton-Lynch submits the following Brief in Support of Motion of Reconsideration.

OVERVIEW

Petitioner commenced the action below against Respondent, Chesare Horton, for failure to set aside or reverse on appeal, a foreign New Jersey judgment filed under the Uniform Enforcement of Foreign Judgments Law. §O.C.G.A. 9-12-130 et seq., sanctioned by the Full Faith and Credit Clause of the Unites States Constitution, before relitigating the final New Jersey judgment in Georgia's Cobb County Superior Court. The trial court granted the modification of custody petition, and the trial court was affirmed by the Georgia Court of Appeals in an Opinion issued March 3, 2010. *(Ct of App. Order A09A1934)* Petitioner seeks reconsideration of this Courts' denial of review by certiorari for the reasons following.

TIMELINESS AND JURISDICTION

This Court denied Petitioner's Writ of Certiorari on September 7, 2010. **(Attached as Exhibit A).** This Brief and the accompanying Motion for Reconsideration is being filed within 10 days, as required by this Court's Rule 27. The Motion is timely and this Court retains jurisdiction.

BASIS FOR RECONSIDERATION

Although Rule 27 does not provide specific grounds for granting a Motion of Reconsideration, the Appellate Court rule 37(c) states, "A reconsideration will be granted on motion of the requesting party, only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority."

Petitioner demonstrates below that the Georgia Court of Appeals; 1) erroneously construed a provision of state and federal law, 2) overlooked a material fact in the record; and 3) overlooked a statute or a decision which is controlling as authority and which would require a different judgment from that rendered.

ARGUMENT AND CITATION OF AUTHORITY

I. A FINAL FOREIGN JUDMENT DOMESTICATED IN GEORGIA UNDER THE UNIFORM ENFORCEMENT FOREIGN JUDGMENT LAW IS SANCTIONED UNDER THE FULL FAITH AND CREDIT CLAUSE OF THE U. S. CONSTITUTION *UNTIL* SET ASIDE OR REVERSED ON APPEAL.

The *United States Constitution Article IV, Section 1* provides:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

In *Durfree v. Duke*, 375 U.S. 106 (1963), the Supreme Court held: "The judgment of the Nebraska Supreme Court was res judicata as to all issues, including the issue of jurisdiction, and it was binding on the District Court under the Full Faith and Credit Clause of the Constitution and the federal statute enacted to implement it." Pp. 375 U.S. 107-116. *See Chrison v. H&H Interiors, Inc. et al. Holt v. Chrison*, 232 Ga. App. 45, 98 FCDR 1434, (500 S.E.2d 41) (1998).[1]

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[1] "Under the full faith and credit clause of the United States Constitution, a judgment of a foreign court will be enforced by courts of this state. That judgment may be collaterally attacked when the foreign court lacked jurisdiction of the person or subject matter. *Gordon*, supra at 171 (1). But when a party appears and defends in the foreign court, the judgment of that court, regular upon its face, may not be attacked in the courts of this state. And when the issue of jurisdiction is raised in the foreign court and decided against a party, this determination may not be attacked collaterally." *Green Acres Discount v. Freid & Appell, Inc.*, 135 Ga. App. 816, 817-818 (219 SE2d 39) (1975).

"Under the full faith and credit clause of the United States Constitution, the courts of this state will enforce the judgment of a court of another state; such a judgment is res judicata between the parties. *Crossby v. Wenzoski*, 164 Ga. Ap. 266, 269 (1) (296 S.E.2d 162) (1982). When Suit is brought in this state to domesticate a foreign judgment, "the judgment may be attacked only if the foreign court lacked jurisdiction over the person of the defendant or the subject matter of the action, or if the judgment was procured by fraud." (Citing from *Murdock v. Madison River Terminal, Inc.*, A01A0088, (547 S.E.2d 802) (Ga. App. 2001) *Economou v. Economou*, 196 Ga. App. 196 91) (395 S.E.2d 830) (1990).[2]

"Although a foreign judgment is entitled to full faith and credit, [226 Ga. App. 612] to be enforced in Georgia it must first be domesticated. For this purpose, the Uniform Enforcement of Foreign Judgments Law, (hereafter "UEFJL") OCGA §§ 9-12-130 to 9-12-138, provides a method for domesticating judgments obtained outside Georgia..." (Citing from *Nationsbank v. Gibbons, et al.*, 226 Ga. App 610, 97 FCDR 2157 (487 S.E.2d 417) (1997).

---

[2] "It is well established that the doctrine of full faith and credit renders the judgments and adjudications of courts of sister states of competent jurisdiction res judicata in this state." *See, e.g., Tandy Computer Leasing v. Bennett's Svc. Co.*, 188 Ga. App. 594, 373 S.E.2d 647 (1988).

A. THE COURT OF APPEALS ERRONEOUSLY MISCONSTRUED THAT AN ISSUE RAISING RES JUDICATA WAS BEFORE IT INSTEAD OF ADDRESSING PETITIONER'S ISSUE ASSERTING THE CONTROLLING AUTHORITY UNDER O.C.G.A. 9-11-60 (D) TO SET ASIDE A FINAL JUDGMENT.

The holding of the Court of Appeals March 3, 2010 Order, was based upon the erroneous conclusion that: 1) Appellant had raised the doctrine of *res judicata* **(Ct. of Appeals Opinion, Pg 5, Para 1)**, thereby passing upon review of appellant's enumerated issue which was; 2) the trial court order was *void* because the final order as domesticated under the UEFJL, was not set aside nor reversed on appeal. The eight (8) words contained within petitioner's first enumeration of error; "*...involving the same parties in the same suit...*", though *unartfully styled*, did *not* raise a claim under the doctrine of res judicata. **(Appellants Brief Enumeration I, Pg 11) (Attached as Exhibit B)**

The doctrine of res judicata is an affirmative defense. O.C.G.A. § 9-11-8 (c) provides: "that, in pleading to a preceding pleading, a party shall set forth affirmatively the defense of res judicata." O.C.G.A. § 9-12-140 et seq. [3]

---

[3] "A judgment of court of competent jurisdiction shall be conclusive between the "same parties and their privies as to all matters put in issue or which under the rules of law might have been put in issue in the cause wherein the judgment was rendered until the judgment is reversed or set aside." ***Miller v. Charles***, 211 Ga. App. 386, 387, (439 S.E.88) (1993)

Petitioner did not raise the issue that custody could not be relitigated but that the *second* judgment rendered by the Cobb County Superior Court, was *void* due to appellee's failure to set aside or reverse on appeal the *first judgment* which was final between the two parties. (**Appellants Brief, Pg 12-13**)

A holding by the Georgia Supreme Court in *Abushmais et al. v. Erby*, S07G0372, (652 S.E.2d 549) (Ga. 2007) provided in pertinent part:

> "[T]he magistrate court, however, *was not authorized to set aside the default judgment* and transfer the case to superior court based upon the parties' agreement because entry of the default judgment *triggered application of OCGA § 9-11-60(d), which restricts to very limited circumstances a court's authority to set aside final judgments. Only after the default judgment had properly been set aside* would the magistrate court be authorized to transfer the case *inasmuch as until the default judgment was set aside, there was no case pending before the magistrate court*.

"O.C.G.A. §9-11-60 provides the *sole* means of attacking a judgment." *Vangoosen v. Bohannon*, 236 Ga. App. 361(1), (511 S.E.2d 925) (1999). "If a second judgment is rendered after a final judgment has been entered...that order is *void*." *See Arrowhead Alternator Inc., et al. v. CIT. Communications Finance Corporation*, 268 Ga. App. 464, (602 S.E.2d 231) (2004).

In *Weatherbed vs. the State*, S99A1222, (524 S.E.2d 452) (Ga. 1999), this Court held; "The judgment of a court having no jurisdiction of the person or subject matter, or *void for any other cause*, is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." O.C.G.A. §17-9-84. "A *void* judgment may be attacked at any time..." See *Bennett v. State*, 268 Ga. 849, 850, (494 S.E.2d 330)(1998).

The **issue** as to whether or not a claim to modify custody between the same parties could be relitigated was not the issue raised before the appellate court. (Ct. of App. Opinion, Pg 5, para 1) The **issue** raised before the court was: the New Jersey foreign judgment, *which was jurisdictional in nature*, was a final judgment properly domesticated in Georgia which was not set aside ***before*** the Cobb County Superior Court rendered a second order regarding the same claim. *Durfree*, *supra* 375 U.S. 106 (1963)

In the case at bar, the Court of Appeals lacked jurisdiction to affirm the trial court's *void* second order modifying a final foreign judgment not set

aside as codified under O.C.G.A. §9-11-60(d). "When a trial court enters a judgment where it does not have jurisdiction, such judgment is a mere nullity; but an appeal from such an illegal judgment will not be dismissed but instead, the *void judgment* will be reversed. [Cits.]" *Darden v. Ravan*, 232 Ga. 756, 758(1), (208 S.E.2d 846) (1974). **(Petitioner's Writ of Cert, Pg 16)**

Petitioner humbly submits that this glaring error of law relating to the lack of jurisdiction of Georgia's lower courts' in the case at bar, is worthy of reconsideration of this High Court.

CONCLUSION

Petitioner avers that the Court of Appeals ruling in this instant case, compromises petitioner's constitutionally protected liberty interest under the Fourteenth Amendment of the U.S. Constitution to custody, control and the legal right to raise her child as her true legal custodian. Petitioner moves this court to reconsider the denial of Writ of Certiorari for review on appeal of the clear errors of law constituting state as well as federal violations.

Petitioner is well aware that the grant of Certiorari is not a right. But she humbly asserts that the jurisdictional foundation and principles that are the bedrock of *every* court; state as well as federal, are lacking in THIS particular case and indeed are mandatory in the interest of justice.

This the 16th day of September, 2010

Respectfully submitted,
/s/ Deborah Hinton-Lynch
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CERTIFICATE OF MAILING

I hereby certify, that seven true and correct copies of the **Petitioner's Motion of Reconsideration and Brief in Support of Motion of Reconsideration** was mailed via Fedex overnight (to the Georgia Supreme Court), one copy via postage prepaid, to remaining parties stated below:

Hallmark Bowman & Hallmark
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This the 16th day of September, 2010

Respectfully submitted,
/s/ Deborah Hinton-Lynch
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SUPREME COURT OF GEORGIA
Case No. S10T1023

Atlanta, March 15, 2010

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

DEBORAH HINTON-LYNCH v. CHESARE HORTON

The request for an extension of time to file a Petition for Certiorari in the above case is granted. An extension is given until **April 15, 2010**, to file.

A copy of this order MUST be attached as an exhibit to the document for which an extension is received.

Court of Appeals Case No. A09A1934

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.
/s/ Lynn M. Stinchcomb, Chief Deputy

UNIFORM CHILD-CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997)

[ARTICLE] 1
GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [Act] may be cited as the Uniform Child-Custody Jurisdiction and Enforcement Act.

Comment

Section 1 of the UCCJA was a statement of the purposes of the Act. Although extensively cited by courts, it was eliminated because Uniform Acts no longer contain such a section. Nonetheless, this Act should be interpreted according to its purposes which are to:

(1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;

(2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;

(3) Discourage the use of the interstate system for continuing controversies over child custody;

(4) Deter abductions of children;

(5) Avoid relitigation of custody decisions of other States in this State;

(6) Facilitate the enforcement of custody decrees of other States;

SECTION 102. DEFINITIONS. In this [Act]:

(1) "Abandoned" means left without provision for reasonable and necessary care or supervision.

(2) "Child" means an individual who has not attained 18 years of age.

(3) "Child-custody determination" means a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. The term includes a permanent, temporary, initial, and modification order. The term does not include an order relating to child support or other monetary obligation of an individual.

(4) "Child-custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence, in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under [Article] 3.

(5) "Commencement" means the filing of the first pleading in a proceeding.

(6) "Court" means an entity authorized under the law of a State to establish, enforce, or modify a child-custody determination.

(7) "Home State" means the State in which a child lived with a parent or a person acting as a parent for

at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

(8) "Initial determination" means the first child-custody determination concerning a particular child.

(9) "Issuing court" means the court that makes a child-custody determination for which enforcement is sought under this [Act].

(10) "Issuing State" means the State in which a child-custody determination is made.

(11) "Modification" means a child-custody determination that changes, replaces, supersedes, or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.

(12) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(13) "Person acting as a parent" means a person, other than a parent, who:

(A) has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and

(B) has been awarded legal custody by a court or claims a right to legal custody under the law of this State.

(14) "Physical custody" means the physical care and supervision of a child.

(15) "State" means a State of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

[(16) "Tribe" means an Indian tribe or band, or Alaskan Native village, which is recognized by federal law or formally acknowledged by a State.]

(17) "Warrant" means an order issued by a court authorizing law enforcement officers to take physical custody of a child.

[ARTICLE] 2

JURISDICTION

U.C.C.J.E.A. SECTION 203. JURISDICTION TO MODIFY DETERMINATION.

Except as otherwise provided in Section 204, a court of this State may not modify a child custody determination made by a court of another State unless a court of this State has jurisdiction to make an initial determination under Section 201(a)(1) or (2) and:

(1) the court of the other State determines it no longer has exclusive, continuing jurisdiction under Section 202 or that a court of this State would be a more convenient forum under Section 207; or

(2) a court of this State or a court of the other State determines that the child, the child's parents, and any person acting as a parent do not presently reside in the other State.

Comment

This section complements Section 202 and is addressed to the court that is confronted with a proceeding to modify a custody determination of another State. It prohibits a court from modifying a custody determination made consistently with this Act by a court in another State unless a court of that State determines that it no longer has exclusive, continuing jurisdiction under Section 202 or that this State would be a more convenient forum under Section 207. The modification State is not authorized to determine that the original decree State has lost its jurisdiction.

The only exception is when the child, the child's parents, and any person acting as a parent do not presently reside in the other State. In other words, a court of the modification State can determine that all parties have moved away from the original State. The court of the modification State must have jurisdiction under the standards of Section 201.

APPENDIX P

UCCJEA Cases by State

Alabama: AL
Code of Ala. § 30-3B-101 et seq.
Peterson v. Peterson, 965 So. 2d 1096, (AL App. Ct.) (2007)

Alaska: AK
Ch. 25.30.300 to 25.30.910
Robertson v. Riplet, 194 P.3d 382, (2008)

Arizona: AZ
A.R.S. §§ 25-431 to 25-454
Melgar v. Campo, 161 P.3d 1269,
(AZ Ct. of App.) (2007)

Arkansas: AR
A.C.A. § § 9-19-101 to 9-19-401.
Ullrich v. Walsh, No. CA 09-1114, (2010 Ark. App. 290 Div. II), (2010)

California: CA
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CHAPTER 191, HB 695 New Hampshire, Effective Date. This act shall take effect **December 1, 2010**. Approved: July 13, 2009

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